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York (State). Governor
E. Hughes.

Before Honorable Charles E. Hughes,
Governor of the State of New York.

IN THE MATTER OF THE CHARGES

AGAINST

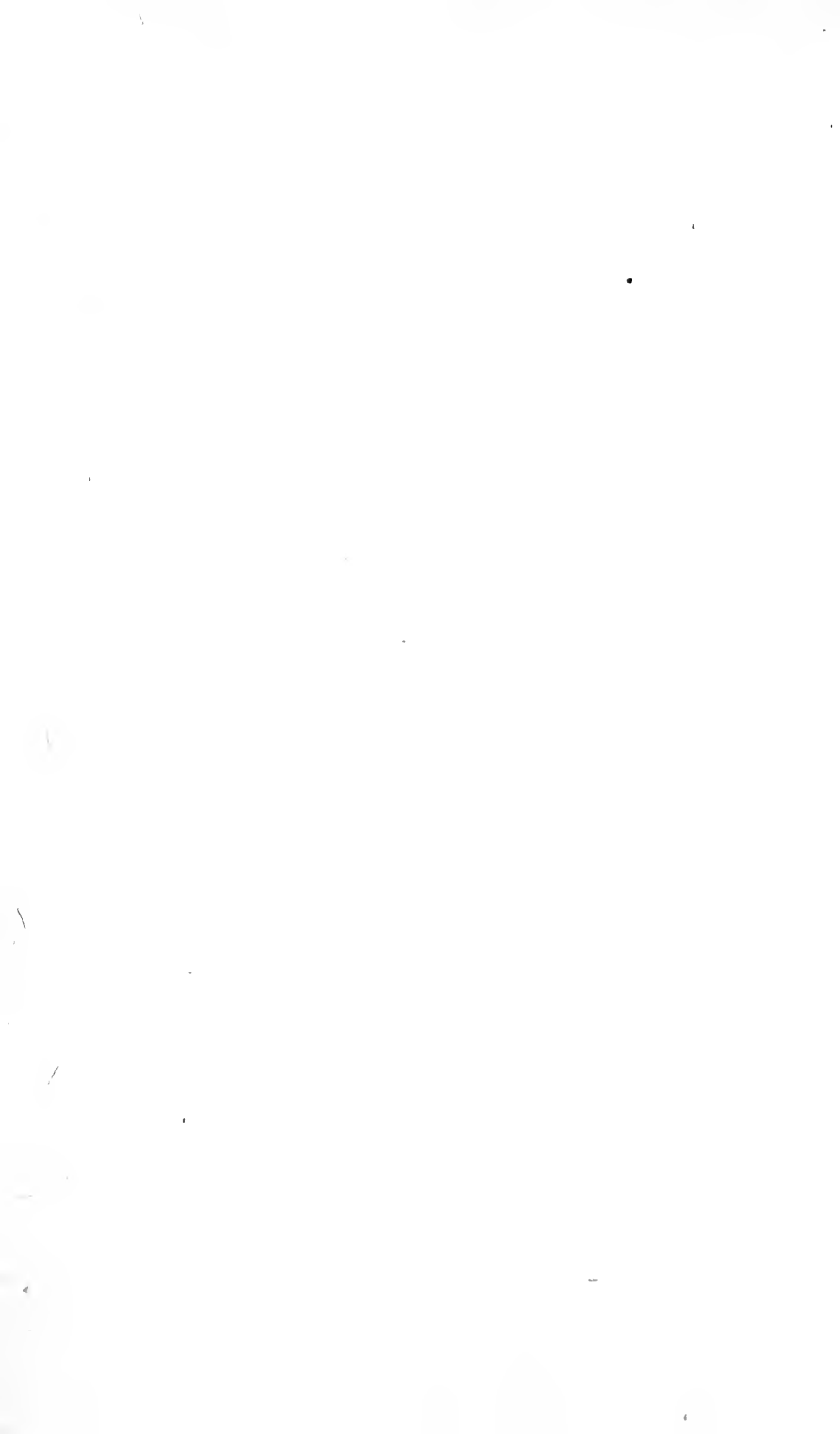
JOHN F. AHEARN, PRESIDENT OF THE BOROUGH OF
MANHATTAN, IN THE CITY OF NEW YORK.

BRIEF FOR PETITIONERS.

NELSON S. SPENCER,
CHARLES H. STRONG,

Counsel for Petitioners.

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Before—HONORABLE CHARLES E. HUGHES,
Governor of the State of New York.

IN THE MATTER

OF

The Charges against JOHN F.
AHEARN, President of the
Borough of Manhattan, in
the City of New York.

BRIEF FOR PETITIONERS.

The charge against the Borough President is of misconduct in office and of incompetency, neglect, waste and violation of law in the administration of his office. Certain particulars are specified, based, as appears in the petition, upon the findings of the Commissioners of Accounts in their report of the investigation conducted by them of the Borough President's office—instituted at his request—and transmitted to the Governor for his action by the Mayor of the City of New York.

This charge is not founded upon any single act or default, nor do the petitioners ask that the Borough President be removed for any single act, but that he should be removed upon the series of acts and omissions shown by the evidence, which, considered together, plainly prove, we submit, that the Borough President has been and is incompetent,

that he has neglected his duties, that he has been wasteful of public interests and moneys, and that he has failed to observe the law. A special instance of dereliction of duty may be excused, but general dereliction such as here appears is, we think, inexcusable.

We also submit that the facts contained in the report of the Commissioners of Accounts have been maintained in their integrity. There is no point of substance upon which they have been successfully assailed, and if, *prima facie*, they warranted the removal of the Borough President, their resistance to attack has enlarged the warrant. It is apparent that the Borough President is himself of the opinion that the warrant exists, for in May last, when only a portion of the facts had been made public by the investigation of the Commissioners of Accounts, in a conversation with Mr. Dalton, which he did not undertake to deny when a witness, he said (pp. 1044, 1045, Printed Record) : "I have been talking with some people, friends of yours, friends of mine, and we came to the conclusion that the only way to save me from being removed by the Governor was for you to resign." The tenor of that conversation forecasts his defense made here.

The defense is virtually a confession of the facts, but a disclaimer of responsibility. He confesses the facts, if in no other way, by his partial house-cleaning, by the removal or enforced resignation of certain of his subordinates, by the appointment of competent men as Commissioner of Public Works and Chief Engineer of Highways, by repairing the streets, by forcing the asphalt companies to live up to their contracts, by procuring supplies to be furnished and repairs to be done by contract after public letting which were before procured or made on open orders (including in this statement orders for sewer repairs), by distributing his orders for

various kinds of supplies and repairs among various persons instead of giving them to favored individuals, and by various lesser reformatations.

It may be said in parenthesis that this enforced repentance is, we believe, insincere. In his conversation with Mr. Dalton, to which we have referred, the Borough President said, as Mr. Dalton testifies (p. 1046, Printed Record): "This won't last long; we want to get a good man in there. When I say a good man I mean a man who don't belong to the organization, who the public will take up and the newspapers make a great time and say, 'Ahearn is doing the proper thing,' and after a little while it will quiet down and you can come back again." In the light of his attitude towards the "organization" as displayed in his cross-examination, this statement bears the marks of genuineness. The suggestion which we make is further supported by his attitude towards Mr. Walker. In spite of his utmost confidence in Mr. Walker (p. 3585, Sten. Min.), he removed him without other evidence than a published statement of testimony taken before the Commissioners of Accounts, although Mr. Walker not only denied the charges, but claimed that he was entitled, under § 1543 of the Charter, to a hearing of the charges against him. When he was advised of Mr. Walker's claim he took no advice of anybody (pp. 3435-3437, Sten. Min.). He has appointed to fill his place temporarily Mr. Stewart, an assistant engineer of the Bureau of Highways, who has no qualifications for the position, and, although this appointment was made in May last, he is still looking around for a man to fill Mr. Walker's place (pp. 3443-3445, Sten. Min.). It may be inferred that he is keeping the place for Mr. Walker, as he proposed to keep Mr. Dalton's place for Mr. Dalton, and that he will have an admirable reason for reinstating him, when he is ordered to do so by the Courts in

Mr. Walker's proceeding against him (p. 2940, Sten. Min.), because Mr. Walker was not given an opportunity of making an explanation as provided in the section of the Charter to which we have referred.

In addition to the confession by deed, there is here a confession of many derelictions of record, coupled with the claim that his subordinates in whom he had implicit confidence were chargeable with the blame. But such an excuse is in this case wholly insufficient. Aside from his direct and active control of the administration of his office, (a matter which we will consider hereafter) to entitle a public officer to rely on his subordinates, they must be chosen with some regard for their fitness for their work, and he must exercise such general supervision over them as will enable him to know that they are faithfully performing their duties. Upon his own testimony, both these elements are here lacking. His immediate subordinates filled their positions because they were district leaders in his political party; so far as appears that was their only qualification, and he did not make even such ordinary examination into the workings of their bureaus as would have immediately shown the derelictions which have gone on for three years unchallenged until an outside investigation revealed them to the public. There is not, and there ought not to be, any distinction in this respect between an elective and an appointive official. If it existed, it would mean that an elective official could never be removed for incompetency or neglect of his duties, for he can always shelter himself behind his subordinates, and the power of removal given by the statute would be rendered nugatory. The Borough President apparently relies upon the fact that he has the sanction of the electors of the Borough for his acts, for he said (p. 3429, Sten. Min.) that if he had done any wrong or had mismanaged his office, he thought the people would not

have re-elected him. The answer is obvious, that the facts which now appear were not known at the time of his re-election, and it may be said with confidence that if he were now a candidate for re-election he could not be re-elected. He also naively confessed his own incompetence, for he said again (p. 3405, Sten. Min.) that Mr. Scannell had no more qualifications to be Superintendent of Highways than he had to be President of the Borough when elected. He must concede that the Department of Highways has been woefully mismanaged. He removed his Commissioner of Public Works because it was so. If then he is no better than that official, he ought also to be superseded by some one competent to hold his office.

The Condition of the Highways.

There is at least one charge which the Borough President cannot meet by any disclaimer of responsibility. That is the condition of the highways. The principal part of his duties under the Charter relates to the streets and their care, and of their condition he had ample notice. The evidence is conclusive that at no time during his administration were the streets kept in decent repair until the summer last past. This is true both as to the asphalt pavements repaired under contract and the stone block pavements repaired by his own force. This statement is made, too, of the wear and tear holes in the streets, aside from other defects, as to which there can be no question of divided responsibility between him and the head of any other department.

The evidence on this point given by Messrs. DeBerard, Howard, Opdycke, Dow and Klein was unshaken on cross-examination, and it is corroborated by the evidence of his own assistant engineer, Mr. Goodsell, who testified (p. 1638, Sten. Min.)

“there were many holes in the streets in the fall of 1906.”

Mr. Allen Wade Dow, a consulting specialist on pavements, testified that in the spring of 1907 he found “at least sixty per cent. of the asphalt streets in a most wretched condition,” and by “wretched condition,” he meant “needing immediate repairs.” He says, “The pavements were worn through so that in a great many cases there were holes three and four feet in diameter and two and three inches in depth; in other cases the holes were often as large as four and five inches in depth, really dangerous” (p. 103, Printed Record). “I have never seen a city with streets in such miserable repair as the City of New York.” He specifies on pages 103-106 of the printed record the streets examined by him, with their condition as he found him. Upon his cross-examination he said, “I do not believe any hole I saw was due to the winter. I believe they were all due to wear and tear * * * I should say it was hardly possible for all those holes to exist from one winter’s wear and tear” (pp. 2619, 2620, Sten. Min.).

Mr. James W. Howard, a consulting engineer, testified that he had examined certain streets in the Borough of Manhattan, which he named, with the result that (p. 113, Printed Record) “About fifty per cent. of the areas of pavements which I have examined of all kinds, north of Twenty-third street, is full of holes, depressions, breaks, disintegrated spots.” The results of these inspections are stated in detail (pp. 117-128, Printed Record). He estimated that in his opinion (p. 128, Printed Record) “Many of those holes had been there more than a year, and some of them I could identify as having been there, in my judgment, two and three years,” that possibly ten per cent. of the defects were holes and defects due to the past winter, and the other ninety per cent. were due (p. 129) “to

“general wear and tear previous to last fall over a “period of years and the neglecting of small holes “when they first appeared.” Upon his examination before the Governor he specifies (pp. 841, 854, Sten. Min.) instances of particular streets in which wear and tear holes have existed for more than six months prior to his examination in the spring of 1907, and says (p. 847, Sten. Min.) that he recognized some holes in 1907 that he saw in 1906. He also gives testimony of defects observed in stone block pavements; for instance, in Cherry street, which he says had more or less deep depressions, some four and some six inches deep. That pavement, in his opinion, had been in that condition two or three years at least (p. 840, Sten. Min.).

Mr. Henry G. Opdycke, a civil engineer and city surveyor, testified that he had made an examination of the pavements of the Borough of Manhattan for the Automobile Club of America, whose engineer he was. A list of the streets examined by him and defects found is on pages 185 and 186, 189-233, of the printed record, inclusive. The result of his examination was “that fully fifty per “cent. of the blocks were in a decided condition of “disrepair, as you use the word. I could say they “were out of repair.” The dry goods section, south of Canal street, which he examined, is paved very largely with stone block pavement. His testimony relating to it appears on pp. 226 to 231 of the printed record. Canal, Church, Walker, White, Lispenard, Thomas, Warren, Murray, Leonard and Franklin streets and West Broadway, inspected by him, all have granite block pavements, and were all in bad condition, with a number of holes noted. Upon his examination before the Governor he said that from personal knowledge some holes, specifically those in Twenty-fourth street, which he saw in April, 1907, were the holes he saw in the previous fall (pp. 765, 773, 777, Sten. Min.), and that

the streets in the spring of 1907 were ten or fifteen per cent. worse in April, 1907, than in the fall of 1906 (p. 772, Sten. Min.).

Mr. Otto H. Klein, the chief engineer of the office of the Commissioners of Accounts, testified that at the direction of the Commissioners of Accounts he had made an examination of the physical condition of the streets of the Borough of Manhattan, between Twenty-third and Fifty-ninth streets, on the 6th of April, 1907; that he found the condition of such streets to be "abnormally bad" (p. 535, Printed Record); that "I would say about ten per cent. were in good condition, which did not require any repair, about twenty per cent. were in a condition which required slight repairs, about sixty per cent. which required very much repair, and ten per cent. were in a dangerous condition, for which I would say the only remedy would be to tear them up and repave them." He testified before the Governor that at least fifty per cent. of the holes which he saw were in existence in the fall of 1906 (p. 738, Sten. Min.).

Mr. DeBerard's testimony is specific. He testified as to examinations of defects made in 1904, 1905 and 1906, of which lists were given in 1904 and 1905 to the Borough President (pp. 623, 3495, 1602, Sten. Min.).

In 1905 a report of an inspection, which recorded something over 2,000 holes needing attention, was transmitted to the Borough President on the 5th of June, 1905, and acknowledged by him on the 6th of June, 1905 (pp. 37-38, Printed Record).

In July, 1906, a third inspection was made of the asphalted streets, and on September 17, 1906, a letter was sent to the Mayor (p. 45) which referred to these inspections, stating that "it is a fact too obvious to admit of dispute that the defects are extremely numerous, and the disrepair of our street pavements is so general and persistent as to cast

“discredit upon the city, to impose a heavy burden
 “of damage and inconvenience upon the business
 “community, and to entail great discomfort upon
 “all citizens.” This letter was referred by the
 Mayor to the Borough President and its reference
 acknowledged in a letter from him of October 30,
 1906 (p. 48, Printed record ; pp. 3462-4, Sten. Min.).

The number of openings in the streets found in
 July, 1906, was approximately 3,000, exclusive of
 Eighth avenue, where “the general condition was so
 “bad that it was impracticable to record the sep-
 “arate defects”—that is, the inspection of July,
 1906, disclosed 1,000 more holes approximately
 than the inspection of 1905.

In November, 1906, another inspection was made,
 covering a very considerable portion of the same
 streets inspected in July, in order to observe
 whether there had been any material change in their
 condition, and at that time the photographs were
 taken which are in evidence. The records of July
 were partly checked in November, and the extent of
 the difference was testified to by the witness in
 detail (pp. 52-66, inclusive, Printed Record).

Mr. DeBerard gave a specific instance of the
 methods of the bureau in relation to the repairs of
 the stone block pavement in Leonard street. That
 pavement is a new pavement laid just after the
 completion of the subway (October, 1904). Imme-
 diately after it had been laid it was opened to lay
 water pipes. The pavement was replaced in a very
 defective manner. It remained so until after Mr.
 Tilson had been appointed in May, 1907, when, at
 the instance of Mr. DeBerard, it was repaired in
 a most leisurely manner, two gangs of men taking
 about a month to do it (pp. 646-648, Sten. Min.).

Mr. DeBerard also testified that the streets have
 never been in a proper condition of repair at any
 time—“full of defects * * * absolute defects

“either caused by cuts or wear and tear holes” (p. 650, Sten. Min.).

Notwithstanding this specific evidence furnished to the Borough President, he made no independent examination to verify its accuracy or truth, but referred it to his engineer for report, and was satisfied with that report (pp. 3495, 3496, Sten. Min.). The report, however, in 1904 showed that the list of defects submitted by the Merchants' Association was accurate (p. 679, Sten. Min.), and the report was largely a record of the fact that the defects had been repaired (pp. 681-692, Sten. Min.). Yet this fact apparently did not excite any suspicion in the mind of the Borough President as to the efficiency of his Superintendent of Highways or Chief Engineer. He made himself only one or two cursory examinations of the streets a year, and those not in consequence of complaints (pp. 3461, 3462, Sten. Min.). He also said that there were constant individual complaints coming in from time to time, all of which were referred as of course to his engineer (pp. 3492-4, Sten. Min.). His engineer, Mr. Olney, testified—although Mr. Goodsell refrained from so testifying—that in the fall of 1906 the streets were in fair condition (pp. 325, 338, Sten. Min.), and that the streets were in no worse condition in the fall of 1906 than in the fall of 1905 or the fall of 1904 (p. 315, Sten. Min.). Upon his engineer's reports, the Borough President also testified that the streets were in a fair condition in 1906 (p. 3326, Sten. Min.). Yet in the spring of 1907—after the investigation—he for the first time himself made a proper investigation, and as a result found them in a bad condition. He virtually removed the engineer because, as he said, the streets had got away from his department (pp. 3343-4, Sten. Min.). He does not explain how the streets could have got away from his department during the winter of

1907, when repairs were being made daily (p. 3343, Sten. Min.), if, as he says, they were in fair condition in the fall of 1906. It is evident that to have reached the condition of 1907 they must have been in bad condition in 1906. This was evidently the Borough President's own opinion, for he refused to believe Mr. Olney's statement that the condition was due to the winter's wear and tear and fire burns (p. 3344, Sten. Min.), and asked for a list of repairs made by the asphalt companies during 1906. Then for the first time he learned that there was no such record kept, and he, therefore, very inconsequently removed his Commissioner of Public Works (p. 3344, Sten. Min.). We have thus, in effect, an admission of his brief that the streets were in bad condition in 1906.

The stated cause of removal, however, is disingenuous, for at the present time no such record is kept. Mr. Tilson testified (p. 1127, Sten. Min.) :

"We don't pay for that work on the main-tenance contract, and for that reason we don't keep an exact record of how much is laid.

"Q. You have no record that would show the extent? A. No, sir.

"Q. And has the office never had, so far as you have found, of the prior record of the office, any record of the repairs made from year to year? A. Not for the streets under maintenance contracts."

Upon this testimony, Mr. Tilson is no more entitled to retain his position than Mr. Olney or Mr. Dalton.

There was, however, a book kept in his office which showed, or purported to show, defects in the highways, beginning in 1905, which the Borough President might easily have consulted. The Governor demanded this book, but it was not produced (p. 1198, Sten. Min.). The inference is inevitable

that it would not have helped the Borough President's defense.

Submitted herewith is a schedule of Mr. DeBerard's testimony as to specific defects, differentiating between cuts and wear and tear holes, and showing that most of them were wear and tear holes. Whenever he used the word "hole" in his testimony, he meant traffic holes (p. 651, Sten. Min.). Many of them were found in July, and again in November. It was incumbent upon the Borough President to show that he had notified the asphalt companies to repair these holes. But all the notices to the asphalt companies in 1906 to repair wear and tear holes were issued in the first three months of that year, one in January, two in February, and one in March, and there are only ten streets named in all of them, none of which is a street in Mr. DeBerard's list (see schedule of notices next hereinafter referred to). In the following year, February 8, 1907, notices were sent to the asphalt companies to repair some of these streets, but very few in comparison with the whole number. The schedule shows such streets, and also what of the streets examined are out of maintenance.

Submitted herewith is a tabulation of all the notices in evidence sent out in 1904, 1905 and 1906 (Exhibits 14, 15, 16, 17 and 18, pp. 492-497, Sten. Min.). It will be seen that most of them relate to the openings in the streets—plumbers' and corporation cuts—and very few of them to wear and tear holes. The notices do not always show on their face to what they relate, but in every case of doubt the Borough President is given the benefit of the doubt, although in many cases it is evident from their character that they must relate to cuts and not to wear and tear holes. The statement as to the notices of 1906 just made is supported by page 6 of the schedule. But the showing is astoundingly small as to wear and tear holes.

Mr. DeBerard's specific evidence in the record does not embrace the result of all of his investigation. The defects shown in the photograph, for instance, are not included in the schedule. We also submit a further tabulation of the results shown by the photographs. These were attempted to be explained away by both Mr. Olney and Mr. Goodsell, but each was compelled to admit that unexplained wear and tear holes still existed. The tabulation shows Mr. Olney's excuses. It does not show Mr. Goodsell's excuses. But the latter are shown in his cross-examination (pp. 1479-1558, Sten. Min.). It is to be borne in mind that the photographs were not taken for the purposes of this investigation to differentiate between wear and tear holes and those the result of cuts, but were taken particularly to show the state of the streets arising from possible divided responsibility, and to accompany the reports of the Merchants' Association to the Mayor.

An effort was made to explain the holes found by Mr. DeBerard in November as the result of fire burns. The fire-burn excuse we will discuss presently. That such could not be the fact appears from the dates of the photographs. They were taken before the 13th of November. All the testimony as to fire burns is to the effect that they do not immediately produce holes, but leave the pavement in a condition from which holes will ultimately result from the effect of traffic. It is impossible that holes of the character shown in the photographs could be produced by fire burns in the space of ten days.

The excuses offered by the Borough President for this condition of the streets are these:

1. That it was owing to the laying of high pressure water mains.

This excuse does not, of course, apply to wear and tear holes. Moreover, it affects only the region of

the borough between Twenty-third street and Waverley place, the Bowery, and the Hudson River (p. 1280, Sten. Min.). The Borough President was ignorant of the district covered (p. 3465, Sten. Min.). Most of the specific defects as to which testimony was given were outside of this district.

2. That it was owing to the fact that the asphalt pavements wore out as soon as repaired because they were laid on stone block foundations.

This does not apply to stone block pavements which showed a condition equally out of repair.

It is not the fact, because if the repairs were properly made the repair should last at least two or three years. (Testimony of Mr. Dow, p. 2625, Sten. Min.) And Mr. Olney testified (p. 416, Sten. Min.) that First avenue was the only place where the foundation occasioned disrepair.

If the repairs (for which the Borough President was responsible) were improperly made, it must have been because the contracts were not enforced. The maintenance contract (Exhibit F, Clause EE) provides that "whenever defects are caused by the failure of the foundation, the pavement, including such foundation, shall be taken up and be relaid in accordance with the specifications." It also provides (Clause DD) that as to all openings made by corporations or plumbers the new foundation shall be of concrete, namely, "The concrete foundation as relaid shall be five (5) inches in thickness." The repair contract (Exhibits 36-39, Specifications, § 3) is that "Whenever, in the opinion of the borough president, the present foundation shall be found to be unfit by reason of settlement or otherwise, a new foundation of concrete shall be laid," and (§ 5) "in case of repaving over cuts * * * the foundation as replaced shall in all cases be of Portland cement concrete."

Notwithstanding this cause of disrepair, of

which he was advised by his engineer in 1904 (p. 317, Sten. Min.), and which is alleged in his answer as "a fundamental and ineradicable defect, which makes it, and always will make it, next to impossible to keep the streets in a condition of perfect repair," he continued to lay asphalt pavements with stone block foundations "on an average of twenty miles a year." (Testimony of Mr. Olney, pp. 319, 320, Sten. Min.). The total amount of pavement of all kinds, asphalt, stone block, Belgian block, macadam and wood block, was only 23.45 miles in 1904, 21.50 miles in 1905, and 22.86 miles in 1906 (Answer, 9th paragraph). After Mr. Olney resigned in May, 1907, the laying of streets with a stone foundation was for the first time done away with (p. 320, Sten. Min.).

3. That openings were made in pavements by other departments over which he had no control.

These openings can be made only by his authority. § 391 of the New York Charter provides "no removal of the pavement or disturbance of the surface of the street for * * * laying down gas or water pipes, steam pipes and electric wires or introducing the same into buildings or for any purpose whatever, shall be made until a permit is first had from the president of the borough where the work is to be done."

The department which made these openings is the Department of Water Supply, Gas and Electricity. There was some indefinite testimony that there were other departments which offended, such as the Park Department, the Bridge Department and the Rapid Transit Commission, but there is no positive evidence as to their actions, and the streets over which they may have jurisdiction are not the streets as to which complaint was made or specific testimony of defects was given. As to the Rapid Transit Commission, the Subway was opened Oc-

tober 27, 1904 (p. 977, Sten. Min.), and since that date the only openings made have been made for the purposes of ventilation, such as those made in Fourth avenue, and which are not the subject of criticism.

In fact, the openings made by the Department of Water Supply are made only upon the Borough President's permit, which gives him complete control over the work done. Mr. Olney testified that since the spring of 1905 there has been no difficulty over any conflict of jurisdiction between the Borough President and the Department of Water Supply, except in the case of high pressure water mains, and that the openings have been repaired promptly, "so that what condition over their leaving things out of repair was not due to the Commissioner of Gas, Electricity and Water" (pp. 327, 328, Sten. Min.). The form of permit issued is Exhibit S888 (pp. 3287 to 3291, Sten. Min.). It provides, among other things, that the trench opened shall be filled "and the pavement immediately relaid and maintained in good order for the period of two years," and it is revocable at any time. It is recorded and numbered so that it is easy to follow the work done under it. Permits were also issued by the Borough President for the opening of the streets to lay high pressure water mains (p. 501, Sten. Min.).

The evidence also is that the number of these openings is inconsiderable compared with the total of 30,000 a year (p. 212, Sten. Min.). In 1906 they were 1,596, exclusive of openings for water mains, of which 792 were in asphalt pavements, 770 in granite block and macadam pavements, 29 in wood pavements, and 5 in pavements not specified. In addition there were 38 applications made for permits to lay water mains, exclusive of high pressure mains. (Testimony of Mr. Brenman, p. 1641, Sten. Min.).

4. That openings were made by public service corporations, which, if left unrepaired, were beyond his power to repair because the city has no repair plant, and the Borough President could not get one asphalt company to do the work of another.

This is a fanciful excuse, because the testimony is that the openings were always promptly repaired by the service corporations, and, moreover, the repair contracts expressly provide for doing the work of another defaulting company. Mr. Olney testified (p. 442, Sten. Min.) that the case had never arisen where a corporation had not given the order to repair to the proper asphalt company, and that "in all cases of these corporation openings the repairs are promptly made," and that "any lack of repair which may have existed was not at all due to openings of the corporations." Mr. Ahearn testified (p. 3314, Sten. Min.) that "I have never yet known where a forty-eight hour notice sent to one of those asphalt companies, that the work was not performed." And the repair contracts (Exhs. 36-39, TTT2) provide (§ B) that the contractor will repair asphalt pavements "when and where directed as may be deemed necessary, or in other streets where the contractor has defaulted or failed to make the necessary repairs when ordered to do so by the Borough President."

In answer to the further suggestion made on behalf of the Borough President, that his estimate for the repair contract did not include repairs to be made upon the default of another company, it is sufficient to say that he not only has the security given by the service corporations at the time when they procure their permits to which to have recourse, but he had in each year unexpended balances in the repaving funds.

5. That openings were made by plumbers for house connections.

In these cases the relaying of the pavement was entirely under the Borough President's control. At the time of the issuance of the permit he required and received a deposit to meet the cost of repaving, and he notified the paving companies to replace the pavement, and paid them for doing it. Exhibits TTT1 (pp. 3300-3303, Sten. Min.).

In fact, these repairs made under his supervision were the longest delayed of any. The plumbers' cut books in evidence furnish complete evidence of this fact. They show the date of the issuance of the permit, the date of the notice to repave, and the date of and condition on completion. Submitted herewith is a schedule of some of the entries in the books, taken at hazard, during the years 1904, 1905 and 1906, showing extraordinary delays in repaving. For instance, on a permit issued for an opening at No. 172 Cherry street on February 26, 1904, the order to repave was given March 1, 1904, and the repairs were not completed until May 10, 1906, an elapsed time of two years, two months and nine days. This street has a stone block pavement, and the delay in repair is chargeable entirely against the Superintendent of Highways. On a permit issued for an opening at No. 143 Stanton street on February 23, 1904, the order to repave was given March 3, 1904, and the repairs were completed May 1, 1906, an elapsed time of two years, one month and twenty-nine days. On a permit issued for an opening at 28 West Third street on October 17, 1904, the order to repave was given October 19, 1904, and the work was completed November 3, 1906, or two years and fifteen days later. In 1905 there are numerous instances of delays from twelve to twenty months, and in 1906 from twelve to fifteen months.

Mr. Scudder testified before the Commissioners of Accounts that the books showed that 106 openings in asphalt pavements in 1904, 102 in 1905, and 578

in 1906 had not been restored at all, and that 120 openings in stone block pavements in 1904, 63 in 1905 and 385 in 1906 had not been restored (pp. 142-156, Printed Record). The latter openings are repaved by the Commissioner of Highways by the repair force in his bureau. Lists of these openings are Exhibits KK, LL, MM, NN, OO, PP, QQ, RR1 (pp. 1811-1814, Sten. Min.). Since Mr. Scudder gave his testimony before the Commissioner of Accounts, the books have been altered by inserting in the column headed "Date of restoration" the words "Restored 5-07," presumably meaning May, 1907. In the book entitled "New pavement cuts A-Z, 1906," Exhibit N, the words "Restored 5-07" appear 339 times to the letter M, November 12. From this point to the end of the book the word "restored" appears in the same handwriting, but no date follows. It seems evident that the entries so made are wholly perfunctory.

6. The fire-burns.

These are almost wholly the result of election day. Of the defects claimed to be fire-burns in 1906, 3,111.5 square yards were measured prior to election day, and 61,368 square yards subsequent to election day (p. 290, Sten. Min.). The treatment of these defects by the Borough President shows of itself a degree of incompetence and waste sufficient, we submit, to warrant his removal. In 1907 he paid out \$144,500 (p. 1723, Sten. Min.) on orders to repair defects which the most cursory investigation would have shown could not have been fire-burns, and which, if they were not fire-burns, the asphalt companies were obliged to repair without charge.

The asphalt companies themselves report fire-burns and send lists of them to the Bureau of Highways (pp. 1140, 1141, 1459, Sten. Min.). Since Mr. Tilson has been engineer very few of the

claims have been allowed. After the strike of the street cleaners in July, 1907, the Bureau had, he says, "a great many thousand claims made and a very small percentage of them were allowed" (p. 1077, Sten. Min.); as to those which were not allowed, they were ordinary wear and tear holes, although as to some of them no defect existed at all (p. 1139, Sten. Min.). Fire-burns do not immediately make holes in the streets; they burn the oil out of the asphalt and make the surface more brittle to the depth of half an inch, and more subject to wear and tear from traffic (pp. 2631-2635). Apparently the Borough President down to the election of the year 1906 was willing to accept the claims of the asphalt companies without investigation. In the year 1905, the defects, alleged to be fire-burns, were repaired under verbal orders given by the Principal Assistant Engineer, Mr. Martin. But the amount was so great that the Borough President repudiated Mr. Martin's orders and refused to certify for payment the charges of the asphalt companies, at least in part. The companies apparently made no great complaint—at least there is no reference to it in the evidence. So in the Fall of 1906, a special inspection was ordered to be made immediately after election. The results of this inspection, if it was made, are incredible. They are recorded in the field books of the inspectors which were produced by the Borough President to support his claim. But a very slight inspection of these books immediately shows that they must be fraudulent. The handwriting of most of them is regular, and in many instances copper plate. Yet they show no thumbmarks or other indicia of being an initial record. They purport to record an examination which is impossible. The inspectors were instructed to measure each hole on the pavement (p. 1478, Sten. Min.), and the books purport to show such measurements.

They worked from 9 to 4 with an interval of an hour for lunch, or six hours each day (p. 1477, Sten. Min.). Mr. Betts, inspector, in Book No. 4 records 420 holes measured on the 21st of November on Eleventh, Seventeenth, Twentieth and Twenty-first streets, or at the rate of 70 an hour, or over one a minute. Mr. Reinisch on December 1st (Book No. 12) pretends to examine 23 streets, and records 350 holes. On Second street from Third avenue to Avenue C, streets Nos. 1 to 312, there seem to have been 276 fires (Book 14, Nov. 12); on Seventy-third street between Third avenue and Avenue A 165 fires (Book 9, Nov. 17); in Eleventh street between Avenue D and Second avenue 285 fires (Book 4, Nov. 21), and in East Third street 185 fires, which, as the Governor remarked, "would resemble a conflagration," and Mr. Goodsell replied, "It certainly did, sir" (p. 1322, Sten. Min.).

From these books lists were made up which were transmitted from time to time to the Borough President, the last being sent December 24, 1906 (p. 721, Printed Record). He was not satisfied with the lists, and sent out his own confidential inspectors to verify them. But this was not done until February and March, when no inspection of value could be made. Yet they reported that the greater number of the defects were wear and tear holes, and should be disallowed (p. 1438, Sten. Min.; pp. 725-728, Printed Record). The Borough President disregarded these reports, and upon an affidavit of Mr. Goodsell, which was made after an inspection made in March or April, 1907 (Sten. Min., p. 1450), later than that of the confidential inspectors, he directed that orders should be given for the repair of the defects. In fact, all the defects disallowed were those to be repaired by the Barber Company. There was no dispute with any other company, and orders had been given to all

companies except the Barber Company (pp. 1448-9, Sten. Min.).

It is a noteworthy fact (p. 1476, Sten. Min.) that 72% of these alleged fire burns occurred in streets under ten or fifteen years period of maintenance, and where such periods will soon expire. This fact is in itself, we submit, very substantial evidence that the defects in question arose from wear and tear, and not from bonfires.

The Borough President testified that the streets in the Spring of 1906 were in good condition as the result of the repair of the fire burns of 1905 (p. 3326, Sten. Min.). But these repairs were made in the fall of 1905, and Mr. DeBerard found the streets in July, 1906, in a deplorable condition. There was no reason why the defects, whatever they were in the fall of 1906, should not have been repaired immediately, as they were in 1905. Mr. Olney recommended that they should be in his letter of December 24, 1906, when he wrote the Borough President that "the work of such restoration should be done as soon as possible in order to put the streets in good condition for the winter" (p. 724, Printed Record). This recommendation, it may also be said, disproves his statement in his letter of March 25, 1907 (p. 271, Sten. Min.), that between December 17, 1906, and March 17, 1907, there were but nine working days upon which asphalt could be laid upon the streets.

7. That the streets could not be repaired in winter.

This is disproved by the fact that they were repaired in the winter. The testimony of Mr. Goodsell was that there were a number of gangs of men at work during each month of the winter of 1906-7, and similarly in the two preceding winters (pp. 1594-1605, Sten. Min.). He also said that a part of this work was done on streets from which the

snow had been removed by the Street Cleaning Department (p. 1598, Sten. Min.). The same fact appears from the returns of the Barber Asphalt Company for the years 1906 and 1907 (pp. 3529 to 3533, Sten. Min.). In January in each year it laid 29,000 square yards; in February of each year 19,000 and 11,000 square yards, respectively, and in March, 1907, 47,000 square yards, as against 15,000 in March, 1906. Yet March, 1907, was an exceptionally bad month as far as weather is concerned (p. 3532, Sten. Min.).

The testimony of Mr. Dow is that in the City of Washington enduring repairs are constantly made in the winter (pp. 2613, 2614, Sten. Min.).

The testimony of Mr. Howard is to the same effect, that repairs can easily be made in the winter, and have been so made to his knowledge in Newark, Philadelphia and Buffalo (pp. 867-869, Sten. Min.).

The contracts contemplate that they shall be so made. They provide (§ I) that "the contractor will carry on the work with such force and in such manner and order and at such times and seasons, as may be directed by the engineer," and (§ CC) "during extreme winter weather any hole in the pavement may be filled and maintained with binder or asphalt mastic." The repair contract contains similar provisions (§§ I and BB).

8. That building operations interfere with the work of repair.

These are wholly under the control of the Borough President. This applies not only to private individuals, but to other departments, such as the Board of Education. No building can be erected or altered without his permit issued by his Bureau of Buildings (§§ 3 and 4, Building Code). And before any part of the street can be used for building operations the ordinances require that a permit be

issued by the Borough President. This permit by ordinance (p. 1501, Sten. Min.) must contain, and does contain, a provision that the pavement, if of asphalt, asphalt block or wood, be protected by first laying planks thereon. The permit issued (p. 1751, Sten. Min.) not only contains this provision, but it provides that the holder will be held liable for any damage sustained to the pavements by neglect to comply with the condition, it limits the time in which the work can be done, and it is revocable upon any failure to comply with its conditions.

With this power in his hands, any injury to the pavement from this cause is without excuse.

9. A lack of money to make repairs.

A great deal was said upon the hearing about the difficulties of the Borough President to procure money for the purposes of repairs to asphalt pavements. There was no complaint about procuring money for the repair of stone block pavements, and in fact the amounts for which he asked and received for the payment of laborers alone for the repair of streets with stone block pavements were constantly increasing, although the mileage of such streets is constantly decreasing as they are repaved with asphalt. That decrease is about 20 miles a year. In the budget for 1907 he asked for \$556,611 (p. 1711, Sten. Min.) for the laboring force for the Bureau of Highways, exclusively engaged, as appears in the budget, in the laying of stone block pavements, as against \$413,599 in 1905, (p. 1699, Sten. Min.) and \$473,705 in 1906 (p. 1709 Sten. Min.), an increase of over \$100,000.

But the claim is effectually disposed of by the fact that he had at the end of the year 1906 unexpended balances in the two funds available for the purpose of asphalt repair amounting to \$124,293.60 (Table, p. 64, Report; Testimony of Mr. Davis, pp. 1718-1721, of Mr. MacNeille, pp. 1742-1749). These

balances are procured by deducting all possible obligations against the funds. They were made up in April, 1907, long after the books for the previous year had been written up, and when there could be no question of any orders against the funds not posted.

And what is still more significant is the fact that in 1906—the year when the streets were especially in need of repair, and the Borough President asserts that he had not money to pay for the fire burns, he transferred to other bureaus from the account entitled Repairs and Renewals of Pavements and Regrading \$43,200, of which \$37,500 was to pay wages and salaries in his Bureau of Public Buildings and Offices, namely, October 12th, \$15,000, November 2d, \$10,000, and December 7th, \$12,500 (pp. 1743, 1744, Sten. Min.).

10. But a sufficient answer to all these excuses is the fact that the streets are now in good repair (p. 1132, Sten. Min.). An enormous amount of additional work has been done this year—shown in the case of the Barber Company by Exhibit TTT9, a comparative statement of the amount of asphalt laid by it in 1906 and 1907. Mr. Tilson testified that there has been no protest from the asphalt companies that they should not make the repairs which they ought to make, except in one or two streets. For the first time since the Borough President took office, he apparently awoke to the fact that it was his duty to have the repairs properly made, and on the 13th of May, 1907, he addressed a circular letter to the asphalt companies (Ex. TTT6, p. 3477, Sten. Min.), in which he said that he trusted that it would “be treated by you as the “last final notice to begin and complete this most “necessary work. I may add that I have taken personal charge and supervision of this work, and I “shall use all the power vested in me by law to see

“to it not only that you are notified promptly, but “to see to it that you do the work just as promptly.” The result of this very proper energy, which could easily have been exercised in 1904, is that the streets have been repaired, and, in the case of certain companies, the pressure upon them has caused them to repudiate their liability to make repairs to certain specified streets (p. 3481, Sten. Min.). He added to the Bureau four Assistant Engineers and 20 to 25 inspectors (pp. 1142, 1147, Sten. Min.), and a new system of systematic inspection was instituted, by which a daily report is made showing all defects existing. A map in the Bureau has recently been prepared which shows at a glance the condition of the streets of the Borough (pp. 1144-1148, Sten. Min.).

The situation as to the high-pressure water mains was met and remedied, and for the first time apparently, the Borough President exercised his power to revoke a permit issued to a contractor to lay these mains. This brought the contractor to terms, and the work of repair was done as the Borough President desired (pp. 1179, 1180, Sten. Min.).

The Borough President is not only to be held responsible for the situation in 1904, 1905 and 1906, but he directly assumed such responsibility. On the 4th of March, 1904, he wrote the Commissioner of Public Works directing him to transmit to him for his approval and signature all notices to the asphalt companies to repair the streets (p. 3472, Sten. Min.). He had daily interviews with both Mr. Scannell and Mr. Olney, and there is every reason to believe that he fully understood the situation and actively directed the work of the Bureau.

In connection with the subjects of the highways, we may also consider the charge of the

Misuse of funds deposited for the restoration of plumbers' cuts.

This charge is admitted. It is excused because, as alleged, it was not invented by the present Borough President—that is, it is sought to excuse the conversion of other persons' money by the fact that others have also committed a similar offense. It is treated lightly by the Borough President—far too lightly for the gravity of the offense.

The excuse given is, of course, no excuse at all. But in addition, there is no proof that his predecessors have done the same thing. The nearest that the evidence shows is that Mr. Mitchel states that he knows that it was the practice (p. 2120, Sten. Min.) and he is probably speaking from mere hearsay. But in the case of payments by Mr. Ahearn's predecessors there has been made in the evidence no analysis of the payrolls. The payrolls do not show on their face that the men paid were not employed in the restoration of plumbers' cuts. In earlier times, when the cuts were almost wholly in granite pavements, the payrolls were properly charged against the fund, because the work was done by the Department. It must be only of late years that payrolls have been improperly charged against the fund. Here the proof is that the payrolls were used for the payment of employees not engaged in the work of restoration of cuts, and what is more significant, it was not a continual use of the payrolls for such purpose, but the great proportion of the payments was made at the end of the year, when they were used to pay other laborers in the Department of Highways—when the appropriation for them had been used up, an appropriation which, as the figures show, was always granted nearly to the extent asked.

The facts are these:

By the charter and ordinances it is made the duty of the Borough President to require a deposit for the restoration of the pavement when granting a permit for any excavation, opening or

disturbance of the pavement. All such deposits must be deposited weekly with the City Chamberlain, and an account of the moneys kept separate and distinct from all other funds as a "Special Fund" (Ord., §§ 148, 149; p. 159, Printed Record). The amount of deposit required is estimated at a certain price a square yard. As a matter of fact both the cost of restoration (that is, the amount paid the asphalt company having the maintenance contract) and the amount of pavement in square yards to be opened is overestimated. There are, therefore, two sources of surplus, and a surplus always arose. The total amount of deposits in 1904, 1905 and 1906 was \$483,146.01, or \$161,000 a year. Not one-half of this was expended in restoring the pavements. The total amount of the cost of such restoration and the refund to the plumbers, when demanded, was, for the three years, only \$202,763.39 (Report, p. 73). The Superintendent of Highways in a letter in the minutes (p. 3121) says that the statement is made to all persons who make deposits that the amount of deposit, after deducting the cost of repairs, will be returned to them. In fact it never was made without a special application from the plumber (p. 423, Printed Record). Also in fact it was frequently refunded, as numerous entries in the plumbers' cut books show.

The fund was deposited in the hands of the City Chamberlain, and payments were made from it upon the requisition of the Borough President. The Comptroller had no means of knowing that the payrolls were not rightly drawn against the fund. For certain payrolls—those for inspection and for the restoration of stone block pavements—were rightly charged. But in the analysis which appears in the record (Testimony of Mr. Scudder, pp. 420-457, Printed Record) allowance is made for all such payments, and the balance remaining

is the highly considerable sum of \$197,784.68, which the Borough President has appropriated to other uses in his department. What he would do if these amounts were demanded by the persons entitled to them he is unable to explain (p. 3589, Sten. Min.). In another connection he said that he felt that he should be careful of the people's money (p. 3353, Sten. Min.). Yet he apparently had no regard for the money of these individuals. It is idle for him to claim that he did not know of the character of the fund or its uses, or the fact that the surplus was to be refunded, for he was frequently signing requisitions for the repayments when they were demanded.

Payrolls 29 and 30 are used for the payment of laborers on macadam streets; payroll 36 for the payment of laborers on stone block pavement. The amount of each of these payrolls was charged against the Special Fund only in the last three weeks of the year—the balance of the year they were charged to their own appropriate funds. The printed form of heading “Pay Roll of Laborers, etc., on Boulevards, Roads and Avenues” (Payroll 29) was used, but the words “Boulevards, Roads and Avenues” are erased, and “Restoring and Repaving Fund” are written in ink in their place. This in itself would seem enough to bring the matter to the Borough President's attention. Mr. Dalton testifies that the charge of the payrolls in question against the Special Fund was in each case ordered by the Borough President personally (p. 1102, Printed Record).

The Borough President was a trustee of these moneys. He knew that fact, and he either knew that he was diverting them, in part, from their lawful uses, or if he did not know it, it was incumbent on him to ascertain his duties and his liabilities. Yet he seems never to have inquired into the facts or the law, or sought advice. No

Court, we submit, would hesitate a moment about the removal of a trustee of a private trust where a similar state of facts appeared.

Also in connection with the subject of the highways we will consider the charge of

The Adoption and Use of Improper Specifications.

For his action in this respect the Borough President tried to shield himself by the action of the Board of Estimate and Apportionment. But no authority has been cited by which the Board of Estimate and Apportionment is given any power to determine the form of the contracts and specifications for laying or repairing pavements in the offices of the respective Borough Presidents. Submitted herewith is a letter from the Secretary of the Board of Estimate and Apportionment, written in answer to an inquiry as to any authority which the Board may claim, in which it is stated that there is no such authority. The Borough President's statement that he had no power himself to change the asphalt specifications (pp. 3590, 3591, Sten. Min.) is negatived by the fact that he adopted a modification of them, according to his testimony, which was suggested by Mr. Whinery (p. 3348, Sten. Min.), and he has continually changed the form of wood block specifications without any application to the Board of Estimate and Apportionment. His excuse for this is that the law did not apply to wood block, but applied only to asphalt. For this distinction he was indebted to Mr. Olney. He never inquired as to why the difference should exist, nor was he ever informed by anybody connected with the Board of Estimate and Apportionment that their approval was necessary (pp. 3591, 3592, Sten. Min.).

The charge relates not only to the adoption of Section 61 of the asphalt specifications, but to the

fact that the specifications were defective and inadequate in many other particulars. These particulars were persistently drawn to his attention by the consulting engineer whom he employed, and yet he neglected to take action upon them.

Taking up first the adoption of Clause 61, the facts seem to be these: The Borough President testifies that his attention was drawn to the existing state of the specifications by a letter from Mr. J. W. Howard, whom he did not know or know anything about (p. 3590, Sten. Min.); that as soon as he got this letter he sent it to the Board of Estimate and Apportionment; that prior to the receipt of this letter he had not considered any change, and the letter was the first suggestion of the kind made to him (p. 3495, Sten. Min.); that the Board thereupon appointed a committee, consisting of Mr. Lewis, the Engineer of the Board, Mr. Olney and himself; that this committee held a public hearing at which representatives of the asphalt companies were present, and that the clause in question was drafted by Mr. Lewis and Mr. Olney and submitted to and adopted by the Board of Estimate and Apportionment. Although he entertained such high regard for Mr. Howard's suggestions when first received by him he apparently paid no respect to any later suggestions made by Mr. Howard. But he did call in Mr. Whinery, an expert, whose views on the question of asphalt oil pavements were well known to be in sympathy with the views expressed in the clause in question. Mr. Whinery states that the clause in question was drawn and in the possession of the Borough President when Mr. Whinery first saw him. Mr. Whinery had had no communication from the Borough President prior to the request to call upon him. Although he acted immediately upon Mr. Howard's letter, he apparently did not in any way rely upon Mr. Howard for advice as to the change proposed. There were

no representatives of the oil asphalt companies present at the hearing, the only companies represented being Barber companies (pp. 1585, 3350, Sten. Min.). So far as Mr. Lewis was concerned it was represented to him that the adoption of the clause in question would not limit competition (p. 1590, Sten. Min.). In December, 1904, Mr. Lewis made a further report (Ex. 43, p. 1574, Sten. Min.) in which he states that "it appears to be conclusively shown that very satisfactory pavements can be made from oil asphalts, and that such pavements have been laid in this city during the last six years with entire satisfaction." Immediately following the adoption of the form by the Board of Estimate and Apportionment, the President of the Borough of Brooklyn, Mr. Littleton, and his engineer, Mr. Tilson, protested vigorously against the use of the form adopted, on the ground that it would limit competition (pp. 616-622, Printed Record). Mr. Tilson's statement is (p. 21) that the clause would "exclude all asphalts used at the present time by the contractors in this borough except those used by the Eastern Bermudez Asphalt Company and the Uvalde Asphalt Paving Company, which I do not think would be a desirable thing to do, as the borough wants more companies laying good pavements rather than fewer." The reasons stated in the letters of protest applied as well to the Borough of Manhattan as to the Borough of Brooklyn, but that protest, though he heard it read, was not considered by the President of the Borough of Manhattan, and he paid no attention to either letter (p. 3604, Sten. Min.). The consequence of the protest was that the resolution was rescinded as to all the boroughs except the Borough of Manhattan.

The result of such adoption was to exclude by a hard and fast rule both Trinidad asphalt and California oil asphalts, both of which had theretofore been successfully used in the laying of pave-

ments in the borough. In doing so it necessarily limited competition, and, as appears from the evidence of Mr. Tilson and Mr. Condit (pp. 1121, 1193, Sten. Min.), the result was shown in the cost of laying asphalt pavements in the Borough of Manhattan, as compared with similar cost of laying them in Brooklyn, greatly to the detriment of Manhattan. Brooklyn was paying only 90 cents a square yard when Manhattan was paying \$1.22 a square yard. In fact, the adoption of the clause has limited competition to a greater degree than was anticipated, because at the time of the adoption there were two sources of supply in Venezuela, one of which was soon after excluded from the market (p. 1193, Sten. Min.). Mr. Whinery testified that at the time he gave his opinion that the clause in question would accomplish the desired result, he was of the opinion that it would not exclude competition, for the reasons just stated, and also for the reason that he had been informed by Mr. A. L. Barber that certain deposits in Mexico controlled by Mr. Barber would be put upon the market. As a matter of fact, these deposits never have been put upon the market (p. 2132, Sten. Min.). The Borough President was familiar with the situation, as he testifies, as to the sources and supply of asphalt (p. 3351, Sten. Min.). He understood that the clause practically limited such asphalt, from a time almost immediately after the adoption of the clause in question, to only one source of supply, the A. L. Barber Asphalt Company (p. 1088, Sten. Min.).

The adoption of the clause had a direct detrimental effect in the Borough of Manhattan, because it prevented the Hastings Paving Company, which had paved a number of streets with block asphalt, from bidding for any further paving. That company was under contract to use Trinidad asphalt only (p. 1191, Sten. Min.). As a consequence the streets paved with block asphalt out of repair remained out of repair for two years, because, as

stated, no company would bid upon a contract for repaving (p. 3604, Sten. Min.).

The reason for the adoption of the section in question which is urged, namely, that of insuring to the City of New York a high grade of asphalt, could readily have been obtained by providing tests which any asphalt must meet. This was the only just way of accomplishing what was the ostensible purpose of the resolution. This was the way suggested by Mr. Whinery himself in the specifications which he prepared for the adoption of the Borough President, to which the Borough President paid no regard. His form of specification which corresponds to clause 61 appears in the Minutes at page 2140, Sections 41 and 42. By these sections specific tests were prescribed for refined asphalt which would admit both Trinidad and California oil asphalts. The particular objection to the use of Trinidad asphalt is that it is subject to be injuriously affected by water, but if properly treated to be able to meet the test prescribed in Sections 41 and 42, the specifications in question will admit of its use. Similarly it is provided in Mr. Whinery's specifications that asphalt resulting from the distillation of crude asphaltic oils may be accepted if they meet the test prescribed in the last paragraph of § 42, page 2142.

The evidence is without controversy that asphalts are made from a distillation of asphaltic oils, which are perfectly acceptable. This appears in Mr. Tilson's letter and from the evidence of Mr. Tilson, Mr. Lewis, Mr. Howard, Mr. Dow, Mr. Whinery, Mr. Klein and Mr. Condit. At page 1199 of the Minutes is a list of fifty-one streets in Manhattan paved with California asphalt.

All these facts were brought to the notice of the Borough President, and it was negligence and waste on his part, to say the least, that he has made

no change in the clause in question from 1904 down to the present time.

The second part of this charge relates to the fact that the specifications are generally inadequate. Mr. Whinery testified (p. 342, Printed Record), that he was employed by the Borough President about the middle of January, 1905, to advise him as to methods of constructing pavement; that the first matter which he took up for the Borough President was the revision of the specifications. He foresaw that that was the first important thing to do, and he brought it immediately to the attention of the Borough President, and they had quite a number of conferences over it. On the 28th of February, 1905, he sent to the Borough President, through his Chief Engineer, a proposed revision of the specifications, together with a letter (p. 345, Printed Record), in which he stated specifically that the specifications as to asphalt pavements were inadequate and indefinite, and suggested that the matter be referred to a Committee composed of the Chief Engineer of the Board of Estimate and Apportionment and the Engineers of the Bureau of Highways in each Borough, with instructions to confer and report such changes as they may think advisable, and that in this way the necessary amendment of the specifications, in particulars about which he apprehended there would be no difference of opinion, could be accomplished, "while the present requirements as to the kinds of asphalt that shall be admitted may be changed or allowed to remain as they are now, as may seem best in each borough. In this last particular the object should be, while excluding materials of known inferiority or of questionable quality, to encourage the widest and freest competition between asphalts whose quality is sufficiently well known, or ascertainable, to render their use safe and prudent."

In the letter of February 23, 1905 (p. 348, Printed Record), sent to Mr. Olney, he submitted the same proposed revision. He recounts the more important changes in the specifications, all of which relate to other matters than the quality of the asphalt. On the 13th of March, 1905 (p. 352, Printed Record), he addressed a further letter to the Borough President, again calling specific attention to the inadequacy and indefiniteness of the specifications, and he says (p. 355) : "The old specifications "are, aside from their positive defects, antiquated, "indefinite and badly arranged, and this alone "would be, in my opinion, sufficient reason for re- "vising them."

On the 15th of March, 1905 (p. 357, Printed Record), he addressed a further letter to the Borough President, in which he said that, in view of the probable early letting of contracts there were some matters which should receive immediate consideration. He then specifies objections to the specifications for both sheet asphalt and wood block pavements. On the same day he addressed a further letter (p. 361, Printed Record) to the President of the Borough of Manhattan, in which he says as to the specifications for wood block pavements: "I very strongly advise that these specifications be revised before any more contracts for "that kind of pavement be let," and he points out that they "practically constitute a monopoly for "one kind of wood pavement in the city. But more "important is the fact that they are so incomplete "and indefinite that they permit the contractor entirely too much latitude in the preparation of the "material and laying it on the street, and under "them the city must depend largely upon the good "intentions, skill and honesty of the contractor." That the good intention, skill and honesty of the contractor are inadequate for the purpose seems to be established by the fact that the Borough Pres-

ident ostensibly removed Mr. Olney for a failure of the contractor to lay the pavement according to the specifications.

On the 17th of March, 1905, he addressed a further letter (p. 362, Printed Record) to the Borough President, pointing out specific instances of the indefiniteness of the specifications for wood block paving. On the 18th of March, 1905, he followed this with another letter (p. 371, Printed Record) on the same subject, in which he points out that the specifications confined wood block pavements particularly to one process of wood treatment, which is patented, although on the 10th of April, 1905, he writes (p. 373, Printed Record) that the United States Wood Preserving Company assert that the specifications do not require the use of the Creo-resinate patented process. The Borough President, however, was not moved to make any inquiry as to the fact (p. 3610, Sten. Min.).

On the 12th of May, 1905, Mr. Whinery submits (p. 385, Printed Record) revised specifications for wood block pavements which point out the defects in the old specifications remedied thereby, among others, that the existing specifications practically exclude all contractors who do not use the Creo-resinate process, and tend to give that process a monopoly. On the 19th of May, 1905, he writes (p. 390, Printed Record) to the Borough President with reference to the contemplated paving of lower Broadway with wood block pavement, that "before further work of this character is advertised for proposals the specifications for wood block pavement now in force should be revised. These specifications are incomplete and indefinite. Some of their requirements are unnecessary, and tend to restrict competition and to increase unnecessarily the cost of the work, while in other par-

ticulars they permit faulty and unsatisfactory work."

On the 26th of June, 1905, he again points out (p. 401, Printed Record) that the specifications for the laying of asphalt pavements are lax and indefinite, and allow the contractor great latitude in the composition of the mixtures.

He submitted to the Borough President forms of specifications for asphalt block pavement, sheet asphalt pavement, and wood-block pavement. But none of the recommendations was ever adopted (p. 416, Printed Record).

Mr. Howard also submitted to the Borough President a form of revised specifications and a criticism of the specifications in use. Although the Borough President had great regard for Mr. Howard's letter, which he transmitted to the Board of Estimate and Apportionment without investigation, he paid no attention to his recommendations for a general revision of the specifications. Mr. Howard's proposed specifications also modified clause 61 so as to afford competition provided the refined asphalt met certain specified tests, and they did not exclude any asphalt.

The petitioners submitted on the hearing a memorandum showing specific clauses as to which exception is taken, based upon the evidence given by the expert engineers who appeared for the Commissioners of Accounts. It seems unnecessary to consider these at this time in detail. The fact appears that the recommendations made by consulting engineers employed by the Borough President for the purpose of advising him on this very point were treated with what may be safely said to be studied neglect, and the result has been harmful to the city. The specifications are particularly indefinite in that they substitute in many clauses the judgment of the engineer for a specific test. It is apparent that it is impossible for any third person to say whether

or not the pavement is laid according to specifications when the specifications are the judgment of the engineer. This is in effect substituting the judgment of the engineer for the contract.

In connection with the discussion of the administration of the highways, we may also refer to the evidence given before the Commissioners of Accounts concerning:

The Enforcement of Contracts for Repairing the Streets with Wood Pavement.

This evidence was undisputed before the Governor, and must be accepted as admitted. The facts appear in the report of the Commissioners of Accounts at page 75-83, inclusive. Briefly stated they are that the bids asked are for units of material used in making the pavement. An estimate of the amount of material of each unit was previously made by the Engineer of Highways. In most cases the material finally paid for greatly exceeded the estimate of the engineer, resulting in a considerable increase over the amount which the contract stipulated should be paid for the particular job. Testimony on this point was given by Mr. MacNeille, and appears at pages 477-531 of the Printed Record. The excess payments were frequently stated to be due to an excess cushion of sand found under the stone block pavements, which the new wood block pavement replaced, necessitating the use of a larger quantity of concrete in the construction of the foundation than the engineers have estimated would be required. Mr. Goodsell testified (p. 1626 Sten. Min.) that the thickness of the sand cushion is assumed without any actual test in the street to ascertain the fact. A summary of the testimony appears in the Commissioners' report, and the table at the foot of page 77 shows an average percentage

of excess of amount allowed and paid over the accepted bid price of fourteen per cent.

In a number of cases excess was also allowed because of alleged errors in the preliminary estimate of the areas of the streets to be repaved. There is no excuse for the failure to properly measure the surface to be repaved. This was substantially admitted by Mr. Goodsell (pp. 1626-1629 Sten. Min.). Both these excesses must have become known to the Borough President, because with each voucher that was submitted to him was also submitted the estimate of the contract cost of the work to be done.

It also appeared before the Commissioners of Accounts that the United States Wood Preserving Company were allowed in their contracts for the city charges for 13,616 cubic yards of concrete, but that only 9,410 $\frac{1}{4}$ barrels of cement had been used in the preparation of the concrete foundations in the ten contracts under consideration. From a computation of the amount of cement to the cubic yard of concrete, given in the testimony of Mr. Welton (pp. 1566-7, Printed Record), it appears that one barrel of Portland cement must be used to make a cubic yard of concrete, if the proportions as required by the specifications are followed, and that in order to comply with the specifications the contractor must use from eight-tenths to one and two-tenths barrels per cubic yard of concrete laid. As a matter of fact, therefore, the city paid for 4,206 barrels of cement which it did not receive, which at an average price of \$1.59 per barrel amounts to \$6,687.54.

There is further evidence that less cement was actually used than was paid for in the examination made by Mr. Gormly and Mr. Scudder of the pavement laid in Dey Street from Greenwich to West Street (pp. 612-614, Printed Record), and a computation made by Mr. Scudder (pp. 610-612, Printed Record). Mr. Olney made the same computation, and it agreed with that of Mr. Scudder (p. 1803,

Sten. Min.). In this case the returned amount of concrete allowed was 636.3 cubic yards. The amount of concrete alleged to have been laid under the pavement proper was 15,994.2 cubic feet. If this quantity of concrete had been used the thickness of the base would have been 8.988 inches. The examination made at different points along the street of the actual thickness of the concrete base showed it to be six inches, or three inches less than the average thickness based upon the amount of concrete alleged to have been used.

That these things could happen shows a most lax condition of the department; it shows insufficient and incompetent inspection, to say the least. Mr. Olney testified that the inspectors were, in his opinion, at least twenty-five per cent. of them incompetent, but he also testified that he had never reported any of them to the Borough President for removal on charges (pp. 346-349, Sten. Min.). Mr. Tilson, on the other hand, testifies that the same inspectors are, in his opinion, "as competent as almost any men I have seen in that position, and that they are as careful of the interests of the City and as much interested in their work as any men that I know of" (p. 1138, Sten. Min.). The inference is that the imperfect inspection was made or the frauds permitted in accordance with instructions from the engineer or Borough President. So far as the laying of wood-block pavement in lower Broadway is concerned, the Borough President attributes the improper results to both the Chief Engineer and the inspector at the plant, and he discharged both. But Mr. Dalton testifies that the Borough President was himself directly responsible for it. He says (pp. 1069, 1070, Printed Record), and his testimony is not denied by the Borough President, that when he was coming up Broadway one morning he found the concrete laid was not of sufficient thickness, and he spoke to Mr. Olney

about it, and asked him to go down and look at it. They both went down Broadway, and met the superintendent of the Company, Mr. Mack. He then says: "That afternoon Mr. Olney came to the office and he told me, he said, 'Say, that thing was a little thin around there, but it is all right. I have had it fixed up and everything is going on all right; they are going in the future to look after it.' That afternoon when I came over I mentioned the incident to the President, and he said to me then: 'I told you before, now, you ought to stay in the office and look after the office there, stay in the office and look after your office work; let your men look after that.' I said: 'A boy getting \$6 a week can attend to my office work.'" He also says (p. 1074, Printed Record) that when the bids were opened for the laying of the wood-block pavement he spoke to Mr. Olney about the amount of concrete. "I think, if I remember correctly, it was something like \$6 a yard, and I told Mr. Olney at the time that seemed to me like a big price for concrete. I mentioned that to the President as well as to Mr. Olney." The President, therefore, cannot properly claim that he had no notice of the situation.

The duties of the Borough President, in addition to those concerning the highways, relate to the purchase of supplies for and repairs made to the public buildings and offices in his Borough, the care of the sewer system, oversight of the erection and alteration of public buildings, and the removal of encumbrances.

The Bureau of Public Buildings and Offices.

The bureau which he considered the most important was the one which spent the most money, which he states to be the Bureau of Public Buildings and Offices (p. 3383, Sten. Min.). This is

characteristic of his administration. His interest in the work to be done was measured by the money under his immediate control. For, in fact, the Bureau of Public Buildings and Offices does not spend the most money, but it does spend the most money through open orders and without the safeguard of contracts. The Bureau of Highways expends four times as much money as the Bureau of Public Buildings and Offices, if we except from the expenditures of the latter the amounts for the construction of the new Hall of Records, with which the Borough President's evidence is that he had nothing to do.

The expenditures for the three years respectively are as follows:

	1904.	1905.	1906.
Highways	\$3,617,890	\$4,451,807	\$4,589,434
Public Buildings and Offices	2,249,940	1,961,442	2,273,331
Or deducting from the latter the amount spent for the construction of the Hall of Records of.	1,174,641	733,708	1,102,286
Leaves	\$1,075,299	\$1,227,734	\$1,171,045

The amounts expended through open orders for the three years are as follows:

	1904.	1905.	1906.
Highways	\$105,840.34	\$103,814.86	\$144,996.33
Public Buildings and Offices	254,016.23	282,525.71	299,156.90

(These figures are computed from the reports of the Commissioners of Accounts in the City Record, Exhibit 70, pp. 4400, 4405. The last stated items appear at p. 2379, Sten. Min.)

In spite of the fact that the Borough President has, as he says, been trying to purchase his supplies and have his work done by contract ever since he has been in office (p. 3625, Sten. Min.), the amount

paid on open orders has increased in two years by \$39,000 in the Bureau of Highways, and \$48,000 in the Bureau of Public Buildings and Offices, although in the same period the amount paid on contracts in the Bureau of Public Buildings (exclusive of the Hall of Records) has decreased from \$482,470 in 1904 to \$426,239 in 1906, or \$56,231 (Exhibit 70).

The Superintendent of the Bureau of Public Buildings and Offices was Mr. William H. Walker. The Borough President is apparently willing to admit that the evidence against Mr. Walker, and particularly his connection with the carpentry done in public buildings, was of such a character that he was virtually contracting with himself, and that he received a portion at least of the proceeds of all warrants drawn for the payment of repairs made by Michael H. Lynch, Boyce & Lynch and Thomas A. Tydings. It was upon a charge of such facts that he removed him, in spite of Mr. Walker's denial of the facts. Without going into the details of the testimony on this point, we may review very briefly the situation as it was developed. When Mr. Walker was appointed Superintendent of Public Buildings by Mr. Cantor, he had in his employment as foreman one Thomas Boyce. He turned his business over to Mr. Boyce, and Mr. Boyce entered into a partnership with one Michael H. Lynch, a man whom Mr. Walker had met at a political meeting, but who has now disappeared. Mr. Walker does not even know his then residence or his present residence. The orders during 1904 were given to Michael H. Lynch, but Boyce was the man who did the work. They were monthly orders for doing such work as might be required by the Borough President during the month. During the year 1905 orders of the same character were given to Boyce & Lynch. At the end of 1905 or thereabouts Boyce gave up the business, and was again

employed by Thomas A. Tydings, and during 1906 the orders were given to Mr. Tydings. In 1904 and 1905 the business was carried on at 49 Christopher street, Mr. Walker's former place of business, the lease of which was held by Mr. Walker. In 1905 Mr. Tydings built the premises No. 418 West Fifty-first street for Mr. Walker's sons, and they carried on a lumber business at that place, although the lease was taken in Mr. Walker's name. Mr. Tydings then moved his office to 418 West Fifty-first street, although he spent a part of his time at No. 411 Hudson street with one Mr. McCleery, who was also a favored contractor, and who had monthly orders for painting on the city buildings. None of these individuals had any bank account, and all warrants which they received were cashed for them by two or three individuals, particularly Mr. Hallanan, Mr. Blake and Mr. McCleery. It appeared in the evidence before the Commissioners of Accounts that amounts similar in character, except that they usually recorded a deduction of an even amount, were deposited in Mr. Walker's bank account practically simultaneously with the time the warrants were cashed by Mr. McCleery, Mr. Blake and Mr. Hallanan. Mr. Walker said he knew nothing of these deposits, that his sons kept no bank account, that he signed any check or note which they would present to him, that he paid no regard to the deposits or withdrawals from his bank account except to see that there was a credit balance maintained. The aggregate of these payments in the three years was \$38,855.70 (p. 2869, Sten. Min.).

Whether the Borough President was or was not aware of these particular financial transactions he could not help being aware, if he had exercised ordinary supervision over his department, that the amounts paid were extraordinarily large on open orders, and that

they all went to one individual in each year. Upon any proper inquiry by him as to the identity or responsibility of these persons it would have developed that they were without responsibility, and held extremely intimate relations with Mr. Walker. The Borough President took upon himself the designation of the persons to whom orders were given, and he required all orders to be submitted to him in blank (p. 1081, Printed Record). It is not credible that he should not have known who those persons were, receiving continuous monthly orders signed by him for work to be done, or that he should not have at least inquired particularly of Mr. Walker. If he did not know, he ought to have known, and his neglect is inexcusable. He had no right to rely upon Mr. Walker's statement that their work had been in the past satisfactory. Whether or not the work done by them was paid for at a price in excess of its value we have no means of knowing. It was all in the nature of repair, and the vouchers do not show on their face whether or not all the work claimed to be done was in fact done. If we may judge by the prices paid by the Borough President for supplies the work cost far more than it should have cost. The Borough President had at his disposal confidential inspectors. They seemed to have been used only for the purpose of making a futile examination of a report of the general inspectors as to fire-burns. They could readily have been used for the purpose of checking up not only this repair work, but also the repair work done by other favored contractors and the prices paid by his department for supplies.

But irrespective of Mr. Walker's connection with the carpenter work his management of his bureau was extravagant in the extreme. Some of the particular instances specified in the evidence relate to the supplies furnished by the Metropolitan Equipment & Supply Company, Mr. Gateson, Mr. Hur-

witz, The Antozone Chemical Company, and to repairs made by Mr. O'Brien and the O'Brien & Ryder Company.

The Metropolitan Equipment & Supply Co. was not a company, but was conducted by Max A. Cramer for his individual benefit. Mr. Cramer was examined before the Commissioners of Accounts, and his testimony appears at pages 1180 to 1200 of the printed record. He there stated that he was an agent merely, and bought of manufacturers and resold. Of this fact Mr. Walker, and presumptively the Borough President, were fully aware. He could not remember what kind of supplies he had furnished to the Borough President's office (p. 1181). He received monthly orders from the Borough President's office to furnish such supplies as might be required, and specific orders for specific supplies during the month. The supplies were delivered directly to the city buildings from the concerns from whom he purchased. These concerns procured a receipt from the city and delivered that receipt to him (pp. 1184-1185). He not only furnished supplies, but he also furnished repairs. These repairs, in the nature of locksmith's charges, and particularly those made by Mr. Spengler, had formerly been ordered by the Borough President from Mr. Spengler directly (p. 2843, Sten. Min.), but after Mr. Cramer's employment they were made through him (p. 2848, Sten. Min.). Even such small repairs as the repair of locks at the Harlem Court House, which for years had been made by John E. Kehoe, locksmith (p. 1336, Printed Record), were paid for by having Mr. Kehoe send the bill to him, and have him include it in his bill to the city (pp. 1266, 1267, Printed Record). For all these repairs he charged an excess over the amount which the locksmith charged.

There appear in evidence the bills which were paid by him for all the supplies furnished to the

Borough President's office, and a schedule has been submitted showing the difference between the prices paid by him and the prices charged to the city. The rate of profits on these supplies increased from the year 1904 to the year 1906, apparently as he became bolder in his practices. In 1904, it averaged 43%, in 1905, 51%, and in 1906 63%. All these bills were kept by him in separate envelopes, each envelope containing the bills relating to a particular order. They were found in that condition by the District Attorney in his filing cabinet at his office. The envelopes are all numbered, and most of them bear on their face a printed legend in the left-hand corner to return if not delivered to Tammany Hall. The District Attorney also found in his office two account books, which have been introduced in evidence. One of these account books contains copies of the bills rendered to the city. Each entry of a bill bears a number which is identical with a number on some envelope. The bills show in many instances not only excessive profit, but overcharges for the goods delivered—that is to say, the goods for which the order called were short on the deliveries. They also show in many cases corrections which either decrease the amount charged where an objection was made by the Comptroller that the prices were in excess of market rates, or increase the amount where he thinks he may make a larger profit than he first proposed to do. The only object of keeping the envelopes and books in this form which is conceivable is that they may serve as a convenient record for the purpose of accounting with some one else for a division of the profits. This is, of course, inference merely, and it has not been brought home in the evidence to the Borough President. But what has been brought home to the Borough President is the fact that he would readily have discovered on the most casual investigation that the

prices were in excess of the market rates, and that no one was furnishing the supplies in question except Mr. Cramer. The excuse given by Mr. Walker was that Mr. Cramer had represented to him that he had arrangements with manufacturers for reduced rates. Many of the supplies, however, were purchased from persons who were not manufacturers (pp. 2819-2861, Sten. Min.), and even where they are manufacturers those same manufacturers sold at retail, and undoubtedly would have sold to the city at the same or nearly the same prices at which they sold to Mr. Cramer. It was not possible in the hearing before the Governor to produce accurate and detailed evidence of this fact. The petitioners did, however, produce such evidence as to the larger items for filing cases which were purchased from the Library Bureau. Mr. Halsey testified that the Library Bureau sold to Mr. Cramer, giving him a trade discount of 10%; that they also sold directly to the City of New York, but without the trade discount (p. 3066, Sten. Min.); that it was to the advantage of his company to sell directly to save the trade discount; that the goods sold to Mr. Cramer were delivered to the Bureau of Public Buildings and Offices at places designated by that bureau, and with the exception of that bureau the sales to the City of New York and elsewhere had been made directly; that the Library Bureau has dealt very largely with the city; and particularly as to certain bills rendered by Mr. Cramer to the city, for filing cases for which Mr. Cramer paid, for instance, \$610, the city would have had to pay \$690 (p. 3081, Sten. Min.). In fact Mr. Cramer charged the city \$860 for these filing cases (p. 2839, Sten. Min.). In the case of the bill of May 19, 1905, for filing cases for which Mr. Cramer paid \$165 they would have been sold to the city for \$181.50, while in fact the city paid \$250 for them (p. 2840, Sten. Min.). In the first

instance the city paid 25%, and in the second 38% more than the market price.

It is to be borne in mind that Mr. Cramer did not furnish supplies to the Bureau of Public Buildings alone. Of the total number of vouchers shown on the schedule 254 were drawn on the requisitions of Mr. Walker, and 104 on the requisitions of the Superintendents of the Bureaus of Highways, Sewers and Encumbrances. It is impossible, therefore, for the Borough President to lay the responsibility for Mr. Cramer's employment on Mr. Walker. The Borough President must have inserted the name of Mr. Cramer's company in the orders sent him from the other Bureaus upon his own responsibility. In the case of the Bureau of Sewers, requisitions came from Mr. Donohue, Mr. Loomis and Mr. Coggey. They surely could not all have recommended Mr. Cramer to the Borough President's consideration.

The Borough President's claim is that the excessive prices should have been discovered by the Comptroller and the Comptroller's inspectors, but it is evident that an inspection made by the Comptroller, some months after the goods had been delivered or the repairs made, was made at a great disadvantage. The Comptroller's inspectors are compelled to rely almost wholly upon the inspection by the bureau. They did nevertheless at times find that the market value of the goods delivered by Mr. Cramer was less than the prices charged by him, and refused to pay the bill. In those cases Mr. Cramer acceded to the reduction. In one of Mr. Cramer's envelopes there was found a bill as originally rendered marked "Correct, William H. Walker." The reduced bill which is attached to the voucher is also marked "Correct, William H. Walker" (pp. 2792-93, Sten. Min.). The Borough President testified that on no occasion did he know that any

reduction had been made. It seems impossible that this should be the case, because when the new bill was substituted for the old one it must have been brought to his attention in order that he should sign the amended voucher, as he did in fact sign it (Voucher No. 23,682, 1905). Furthermore, the inspection in the Comptroller's office of the greater part of the bills of Mr. Cramer seems to have been done almost wholly by Mr. Charles Jacobs. Mr. Jacobs also inspected almost all of the bills rendered by Mr. Hurwitz. He knew Mr. Hurwitz as a member of the Jefferson Club (p. 1243, Printed Record). Mr. Jacobs' testimony appears in the Printed Record at pages 1398-1445. He testified (p. 1423) that he had been instructed to allow 33 1/3% as a profit to the dealer; that although he had his opinion that the amount was excessive, he never expressed it. Mr. McKinny, his superior officer, testified that no order was ever issued that 33 1/3% was to be allowed on supplies furnished to the city or work done by the city, but that an order was issued that where no prices could be obtained under no circumstances could more than 33 1/3% on the wholesale price be allowed (p. 1510, Printed Record). Mr. Jacobs also testified that he passed all bills where the amount was less than \$75 without investigation, and that no check was ever made of the delivery of the goods (p. 1442, Printed Record). It may be inferred that Mr. Jacobs was induced to pass the bills of the Metropolitan Equipment & Supply Company and Mr. Hurwitz for some ulterior consideration.

The employment of Mr. Hurwitz and Mr. Gateson was made at the instance of the Borough President. Mr. Gateson had the work of furnishing and putting up all the awnings for the city buildings. He was a friend of the Borough President. The Borough President had known him over twenty-five or thirty years. The Borough President says that

he is an old labor agitator, a man of a great big family, a sailmaker. "He worked for some firm down on South street or West street, some sailmakers, and in the evening he used to take odd jobs around in the neighborhood to put up awnings or supply awnings." The Borough President doesn't know where he got his awnings or whether or not he put them up alone. The Borough President never made any inquiry as to the prices paid (p. 3645, Sten. Min.). As to this particular item, for which it appeared in the reports of the Commissioners of Accounts (Exhibit 70) that the city paid \$12,224.75 in the three years, 1904-6, the Borough President must be held directly responsible. Whether or not the prices charged by Mr. Gateson were excessive does not appear, but it is surely the fact that the work could have been let on contract, and that it was a distinct violation of § 419 of the Charter to award the work to Mr. Gateson. The examination of Mr. Walker and the vouchers in evidence showed that the price charged was based upon the size of the windows only, and it would have been an easy matter to let a yearly contract to put up such awnings as might be required during the year at rates varying according to size. This was repeatedly and specifically urged upon the Borough President by the Comptroller (pp. 2381-2410, Sten. Min.).

Mr. Hurwitz was also employed at the instance of the Borough President. He lives not much more than a stone's throw from the Borough President (p. 3634, Sten. Min.). His own account of his employment is most singular. He testified before the Commissioners of Accounts (p. 1215, Printed Record) that the Borough President asked him one day if he would do any repair work, and he said certainly, and the Borough President said he would give him a job to do some work. The Borough President did not ask him to submit prices,

but Mr. Walker sent him an order. He had known the Borough President only about a month before having that talk with him. He met the Borough President on a corner one day, and the Borough President said, "Do you do pump work?" "And I says, Yes." "There is a pump out of order in the City Hall." He had met the Borough President maybe a month before. "I did not know the man. * * * I never spoke to him before." And about a couple of days later he received an order from him. From that time he got orders regularly. He is now a member of the John F. Ahearn Association, but he was not at the time of this interview. He joined the club when he began to do the work. His testimony was read to the Borough President, and the latter testified (p. 3639, Sten. Min.): "I don't know but that conversation might have happened between me and him there, and that I might have invited him there. I don't know as I did or did not. But I sent him to Mr. Walker." The Borough President says further (p. 3642, Sten. Min.) that he did not know what he was going to furnish.

Mr. Hurwitz did electrical work for the city and, among other things, furnished mantles and green domes. He also received monthly orders for work to be done as required. He was not a manufacturer of mantles. The statement of Mr. Walker is that the city had previously been purchasing mantles of the Welsbach Company at the rate of forty cents each, but that Mr. Hurwitz agreed to furnish these mantles and install them also for the same prices. The vouchers show, however, that Mr. Hurwitz did not furnish Welsbach mantles, but furnished other varieties, all at forty cents each. His testimony also is that these mantles were made for him with his name upon them by some one whose name he refused to give (p. 1205, Printed Record), and were furnished to the city at forty cents apiece. Inasmuch as the mantles "ain't sold nowhere, no-

where in the United States" (p. 1206, Printed Record), it is impossible to say what is their market price, but at times he furnished specified kinds of mantles, namely, the "Black Diamond" mantle and the "Schaeffer" mantle. Each of these could be purchased in the market at prices ranging, according to Mr. Hurwitz's testimony, at from four cents or five cents up to twenty-five or thirty cents (p. 1228, Printed Record), although he is unable to remember what in fact he paid for them. Mr. Hurwitz can only read printing. He does not know where his bills are made up, and he could not tell whether or not they were made up in Mr. Walker's office (pp. 1234-1237, Printed Record). He would not swear he didn't send his billheads to the Bureau of Public Buildings, so that his bills could be made up there, and he would not swear he did (p. 1261, Printed Record). He charges \$1 apiece for green domes, although their market price is \$4.50 or \$5 a dozen (p. 1254, Printed Record). He also charged, as appears in the vouchers, for the installation of mantles, in spite of Mr. Walker's testimony of his agreement to make no such charge (pp. 2932-2940, Sten. Min.).

The disinfectant was very largely purchased by the Borough President from the Antozone Chemical Company. The market price of disinfectant when purchased on contract by the Fire Department was 35 cents a gallon, and when purchased in the open market 86 cents a gallon (p. 3099, Sten. Min.). It is the same disinfectant which is listed at \$1 a gallon (p. 3112, Sten. Min.). The city paid the Antozone Chemical Company \$1 a gallon. This purchase was made through an agent, whose name is Hughes. All the orders were given to Mr. Hughes, and not to the Chemical Company. In the year 1906 Mr. Hughes ceased to be the agent of the Antozone Chemical Company, and the orders to the Chemical Company ceased at the same time

(p. 1159, Printed Record). Mr. Dreyfuss, the president of the company, testified (p. 1160, Printed Record) that he didn't deal directly with the city because "we didn't know any one; we couldn't get the orders," that he asked Mr. Walker once why he couldn't get any orders, and Mr. Walker replied, "You got your man around here, he gets them, anything we have" (p. 1163, Printed Record), and that they never sold anything to the city before they got Mr. Hughes (p. 1166, Printed Record). Mr. Hughes got a commission of thirty-five per cent. (p. 1160, Printed Record).

Substantially all the orders for plumbing and steamfitting were given to the firm of O'Brien & Ryder. The total amount paid them in 1904, 1905 and 1906 was \$110,136.14 (Ex. 70). The Borough President says that this firm was one of the contractors on the list discussed by Mr. Walker with the Borough President upon his installation in office, although Mr. O'Brien was not the favored plumber of President Cantor (p. 3451, Sten. Min.); Mr. Walker says he was not (p. 2660, Sten. Min.). Prior to 1904 the plumbing orders in the Bureau of Public Buildings and Offices were given out generally. "Every one has his own friends" Mr. Walker testifies (p. 2661, Sten. Min.). The excuse given for giving all the work to O'Brien & Ryder is that Mr. O'Brien was familiar with the various steam fitting plants and that it was necessary to have some one that was thus familiar to do the emergency work for the bureau (p. 3613, Sten. Min.). The orders were given to Joseph W. O'Brien, but the work was done by O'Brien & Ryder. This practice continued until the O'Brien & Ryder Company was formed about the 1st of January, 1906. After that date the orders were given to the O'Brien & Ryder Company. Mr. O'Brien received two monthly orders each month, one for work inside the City Hall Park and the

other for work outside of the City Hall Park. The aggregate of the amounts paid him under the two orders was always in excess of \$1,000, though each individual amount was less than that sum. Mr. O'Brien was examined before the Commissioners of Accounts, and his testimony appears at pages 1272-1335 of the Printed Record. He testified that he had become familiar with the plumbing and piping systems of the various buildings in the course of his work upon them, that Mr. Ryder had not done so, and that Mr. Ryder never attended to any of the city's work, nor did any other member of the firm (p. 1283, Printed Record). In this he contradicts Mr. Walker (p. 2668, Sten. Min.). He does not know the Borough President. Nor does the Borough President know him (p. 3612, Sten. Min.). On the 1st of June, 1906, he sold his stock in the O'Brien & Ryder Company to Mr. Ryder, and since that time he has had nothing to do with the work of that corporation (p. 1275, Printed Record). The corporation continued, however, to receive the orders from the City in spite of the fact that it could no longer depend upon the intimate knowledge of Mr. O'Brien of the plumbing in the buildings. The work was then done by Ryder and a man named Otis. Mr. Walker's explanation is that their foreman had as large a knowledge of the buildings as Mr. O'Brien himself, and for that reason the work could continue (p. 2669, Sten. Min.). The real reason, however, is that it was Mr. Ryder's connection with the firm, and not Mr. O'Brien's, which brought the orders to the firm. Mr. Ryder was a leader in Tammany Hall. The Borough President had known Mr. Ryder intimately for six or seven years (p. 3452, Sten. Min.). He evidently considered the work done for the city as very valuable to O'Brien & Ryder, for when he removed the Commissioner of Public Works he said to him, as Mr. Dalton testifies (p. 1046, Printed Record):

"Now, supposing that something was put in your way which would make up for at least your salary and more than your salary and you had nothing at all to do, wouldn't that be better for you? Now, I will show you how we can help you out. Here is supplies given out every day, and here is one big job; here is a poor fellow, and I am very sorry to say he is not going to last long, and you can come in when he dies; you get his share of the profits of that plumbing business. Mr. Ryder, who is to-day very ill, if not dead. You can get his share."

And again, at page 1049, in answer to a question, Mr. Dalton testifies as follows:

"Q. And that as an inducement to procure your resignation he undertook to promise a share of the profits of the plumbing firm of O'Brien & Ryder after the death or the expected death of Mr. Ryder, is that so?

"A. Well, Mr. O'Brien's name was not mentioned, but it is, of course, the firm, as I understand, of O'Brien & Ryder."

Mr. Dalton answered the Borough President, according to his statement (p. 1123):

"I told him I wasn't a plumber, wasn't in that line of business, and I had a reputation that I wanted to live up to, and had a wife, and any amount of money he could put in there through plumbing or anything else would not pay me for what he had done to me in removing me."

Like all repair work, we have no means of determining whether the bills submitted by O'Brien & Ryder were proper or not. They represent repairs, and there is no present way of checking the repairs or the time which it took to make them. We can only infer that it must have been exorbitant from the enormous amount of \$110,000 paid the firm in

three years for so-called emergency work. There is one voucher, however, which bears upon its face evidence that the charges were exorbitant. It is so patent that if the Borough President had examined it, as he says he examined all bills certified by him, the excessive charge could not have escaped his attention. This is a bill for installing nickel-plated clothes hooks in various public comfort stations. According to this bill it took the plumber and his helper 31 days to put up 165 hooks, at a cost of \$365. Mr. O'Brien does not know the cost of the hooks (p. 1334, Printed Record), although Mr. Walker seems to do so (p. 2654, Sten. Min.), but the cost to the city was at the rate of \$2.18 per hook. It took two men 5 days at \$8 a day to put up 27 hooks, or at the rate of 2 7/10 hooks for each man a day, or one hook in three hours (p. 2656, Sten. Min.).

That the methods of the Borough President in the procurement of supplies and in the making of repairs have resulted in a substantial waste of the city's money is apparent by comparing his methods with those of the Fire Department. The Borough President testified (p. 3370, Sten. Min.) that he was "a friend of old John Scannell, who was a Fire Commissioner in New York City, and he was indicted on the question of the purchase of supplies, and I was very much interested in that case * * * I was more careful on account of the trouble Scannell had gotten into on account of the purchases of those supplies." He had therefore directly brought to his attention the usages of the Fire Department in this particular and, in view of this testimony, if he did not actually know of their present procedure in the matter of the purchase of supplies, he surely ought to have known it.

The Fire Department procures supplies in very large amounts, many of them of the same character as those procured by the Borough President. Al-

most all of these supplies are furnished under contract, and the various forms of specifications appear in evidence as petitioners' Exhibit CCC. The result of procuring these supplies by contract is shown in the prices at which they are procured. The contract price in the Fire Department for linoleum is 57½c. a square yard. The Borough President paid 85c. per square yard for the same quality. The price of Brussels carpet in 1906 to the Fire Department was \$1.09 a yard. The Borough President paid \$1.50 a square yard (p. 2410, Sten. Min.). We have already spoken of the difference in the prices paid for disinfectants, 35c. and \$1.00 a gallon. The price paid for cotton mops by contract in 1906 by the Fire Department was \$1.14 a dozen. The price paid by the Borough President is \$1.88 a dozen. (Testimony of Mr. Healy, pp. 3097-3124, Sten. Min.). Where supplies are furnished or repairs made without contract on public letting in the Fire Department they are always let upon estimates. Bids are invited from three or four different persons, usually three, and the persons invited to bid in the various instances are not the same. The persons invited are usually persons with whom the department has a contract, and persons ascertained by reference to business directories. With regard to plumbing work, they are usually local plumbers (p. 3089, Sten. Min.). In asking bids for supplies no distinction is made between manufacturers and jobbers (pp. 3088-3090, Sten. Min.).

The Borough President has substantially confessed that his methods of procuring supplies were wasteful and extravagant by changing them. The change was made when Mr. Walker was removed, and Mr. Thompson assumed control as Commissioner of Public Works. The plumbing and steam fitting, for instance, is now done by nine different firms, instead of one (p. 3626, Sten. Min.). The

hardware is purchased directly from two firms in the trade, instead of from the Metropolitan Equipment & Supply Co. The various kinds of supplies which were formerly purchased from the Metropolitan Equipment & Supply Company are now distributed among a number of different dealers and manufacturers. All the favored contractors have been eliminated, and the names of the various dealers who furnish supplies to the Borough President, as shown in petitioners' Exhibit TTT10 (p. 3629, Sten. Min.) are well known in the trade.

The Violations of § 419 of the Charter.

The schedules of instances of these violations, submitted with the vouchers showing the facts, were introduced in evidence, and Mr. Walker was examined at length concerning those which affected his bureau. He was also examined as to the various details of the various supplies furnished and repairs to be made for which the Borough President asked appropriations in his annual budgets. Upon their face these estimates showed that the work was foreseen and could very largely have been let upon contract. The various letters from the Comptroller which appear in evidence also show that, at least in his opinion, work which had been given out on open order could be let on contract. The replies to those letters which were written by the Commissioner of Public Works, and quoted statements of the heads of the bureaus, are, especially in Mr. Walker's case, too indefinite to possess any value. In some instances which appear in the evidence it is apparent that Mr. Walker's answers are disingenuous and deceitful. In some of Mr. Walker's replies, particularly those relating to soap powder, he stated to the Comptroller that a form of contract was under consideration. This was in the latter part of 1905, but it took him a year and a half to draw the specifications for such a contract,

although he testifies that they were drawn at the time he was removed (pp. 2430-2442, Sten. Min.). No effort, however, had then been made to put them into effect. The fact that contracts are now let for many of the supplies or repairs which were formerly given out through open orders is in itself a confession that the former practice was unnecessary, and therefore illegal. An effort was made on behalf of the Borough President to offset the effect of these letters by the introduction of letters written by the Comptroller to other departments similar in character to those sent to the Borough President. None of them, however, was of as incisive a character as many of those sent to the Borough President (p. 2427, Sten. Min.). The fact that other Departments were similarly violating the law does not excuse the Borough President. It simply means that they also are the subject of grave criticism. A further and familiar excuse offered by the Borough President is that the cases which seemingly violate the section in question were to meet emergencies. The law does not recognize emergencies, and the practice of allowing the head of a department to determine when an emergency arises, resting merely upon his opinion of the fact, is one that renders the provision of the Charter substantially nugatory. If there is a real emergency, the Charter provides a method to meet it, through an application to the Board of Aldermen. This application was seldom made. The number of applications made by the Borough President, which appear in the petitioners' Exhibit HHHH (p. 2331, Sten. Min.) number only 2 in 1904, 5 in 1905, and 7 in 1906, a total of 14 for the three years of his administration.

On November 21, 1904, the Commissioners of Accounts rendered a report to the Mayor relative to violations of the section of the Charter in question (Ex. BBB, p. 1869, Sten. Min.), in which they say that in presenting the data of the report it is

not their purpose "to unduly criticise the administration of the former Borough President, "but rather to call the attention of the present "President of the Borough to the provision of the "Charter above quoted to the end that no occasion may arise for an unfavorable comment upon "his administration." It recites payments in excess of \$1,000 made for supplies and repair by Mr. Cantor to a number of persons, among others to Mr. McCleery and to Mr. Lynch, and says that "in most cases where labor and material for repair work was paid for by requisition and order, it was practicable to have contracted for the work at public letting." It then cites instances of painting work given to Charles J. Crowley for painting and decorating rooms in the Criminal Court Building devoted to the use of the District Attorney, aggregating \$6,710.20, similar in character to the work on the same building given to Mr. McCleery, and says that if, as stated by the Superintendent of Public Buildings, Mr. Walker, the repairs were needed with more than ordinary dispatch, it would have been better had he obtained permission of the Board of Aldermen to have the repairs done without contract, and that they believe that it would be advisable to always obtain the permission of the Board of Aldermen for the expenditure of money for repairs or supplies where the same in the aggregate will amount to over \$1,000 before incurring such liability. Neither the Borough President nor Mr. Walker apparently paid any attention whatever to the recommendations of this report.

There is another method of meeting a real emergency, which he failed to make use of. The real emergency usually arises in repair work of various kinds, and that it is an emergency in the proper sense of the term almost always is patent from the facts of the case. Such repair work can

be done by the employees of the department. Doing it in this manner would not only avoid any infraction of the statute, but would also usually save money to the city, because it would save the contractors' profits. Such has been the experience of the Fire Department, as Mr. Healy testifies (p. 3096, Sten. Min.).

We will not undertake to discuss the various items of the schedules which show the infraction of the section of the Charter in question. The evidence regarding them appears, with regard to the Bureau of Public Buildings and Offices, at pages 2682 to 2775 of the Stenographer's Minutes; and with regard to the Bureau of Sewers at pages 2944 to 3021 of the Stenographer's Minutes, and at pages 1761 to 1799 of the Printed Record. The instances of the repair work done in the public baths and the various painting jobs are peculiarly flagrant. Mr. O'Brien testifies in relation to the three orders for the West Sixtieth street baths (p. 1330 of the Printed Record), that Mr. Walker knew of the necessity of all the work when he began it. "He knew there was no water supply before I went there, and so did everybody else." Mr. McCleery testified as to the painting work in the Harlem Court House, that he did the work on the third order before he did the work on the first and second orders (pp. 901, 904, Printed Record). There can be no reasonable doubt that the purchase of disinfectants, soap, mantles, oil and cotton waste, and such articles, ought to have been purchased by contract. The Borough President knew from experience about how much he would need each year, and his estimates for the budgets show that they were always much in excess of \$1,000. He paid for soap, for instance, \$2,746 in 1904, \$3,768 in 1905, and \$3,711 in 1906. He paid for disinfectants \$3,865 in 1904, \$4,002 in 1905 and \$1,993 in 1906 (Exhibit 70). He paid for paint-

ing \$7,536 in 1904, \$12,521 in 1905, and \$12,921 in 1906. He paid for hardware, which is bought at public letting by the Fire Department, \$15,838 in 1904, \$15,913 in 1905, and \$15,407 in 1906. The cross-examination of Mr. Klein with reference to the Bureau of Sewers was waived for lack of time upon the hearing, without prejudice to the charge. It seems unnecessary to examine the various letters introduced in evidence in relation to the Sewer Department in view of Mr. Klein's testimony (pp. 3023-3024, Sten. Min.), that since the investigation by the Commissioners of Accounts they had let at public lettings work similar to the work which had before been given out to the Hickey Contracting Company. It was attempted to be shown that since this has been done in the Sewer Department the cost to the city has been increased. On this point Mr. Klein was not cross-examined. Even if this be the fact, it is no excuse for the infraction of the law. It may be that the work under certain circumstances can be more advantageously done through a private contractor than through public letting, but experience has shown that it is not safe to depend upon this method, that it affords too large opportunities for favoritism, and that there is no reason why one favored friend of an official should procure all the work of a certain character in his gift to the exclusion of other persons able and willing to do the same kind of work. It is undemocratic and economically faulty in theory, and the law recognizes it to be such and prohibits it.

The Borough President seeks to evade responsibility for these violations of law by declaring that he never saw any of the notices sent to him by the Comptroller. This seems incredible, but even if it be true it could not have escaped his notice that amounts largely in excess of \$1,000 were annually expended for supplies and repairs of a specified

character. These items appear in his annual budget, and his testimony was that he prepared himself carefully upon that budget to meet any inquiries that might be made by the Board of Estimate and Apportionment. Furthermore, Mr. Dalton testifies as follows (p. 1097, Printed Record) :

“Well, in all cases where two orders coming together, within a day or two, or for the same place, would amount to over \$1,000, I would then draw the President’s attention to it. * * * He said that it was all right; that he had went over the thing with men who understood the business, and the matter was all right as long as they were not on the same date and on the same piece of work,”

and that he had drawn those cases to the attention of the Borough President a great many times. He further said (p. 1098, Printed Record) that in every instance it was the Borough President who passed upon all of those cases, and who would determine whether the order was properly issued or not.

Bureau of Encumbrances.

The charge is of neglect to enforce the ordinances of the City of New York relating to encumbrances, and that in such action as the Borough President has taken to that end he has often been controlled by personal or political considerations.

The testimony in the Printed Record on this point is not denied. The Superintendent of the Bureau of Encumbrances is Mr. McEntegart; he holds a competitive position. His understanding of his duties is found in his testimony at pages 1947-2078 of the Printed Record. He there states that he considers it his duty to remove any encumbrances that exist in violation of law. It appears, however, in the evidence that many violations of law are not removed, but are permitted. Prior to 1907 encum-

branches were not reported, and action was only taken upon the complaints which the Bureau received, which are to the number of about 3,000 a year (p. 1950). After the appointment of Mr. Thompson as Commissioner of Public Works, however, instructions were issued by the superintendent to his inspectors to report all encumbrances which were violations of law; prior to that time they had not been doing so (p. 1983). They acted entirely on complaints that came from the police or private citizens. Mr. McEntegart did not consider it necessary or proper for these inspectors to report these violations where it annoyed the persons who were responsible for them (p. 1985), and if the complaint which is made proves to be what he considers a small violation of law he pays no attention to it. He gives an illustration of the kind of violation which he would enforce, as follows:

“Take a sign that is only a foot square, a party may complain of that, that it interferes with him; I look at it and say it doesn’t interfere with him. Take another one eight or nine foot square; now, there is a big difference between the two of them.

Q. They are both violations of the law?

A. Both violations of the law, no question about that.

Q. You make up your mind whether it is a serious enough one or not?

A. Yes” (p. 1989).

He also says that he pays no attention to, and does not investigate, anonymous complaints, although anonymous complaints would show that the law was being violated as well as ones signed (p. 1993). It appears that he does not do so because of a complaint made with reference to a stand maintained at Fortieth street and Seventh avenue by a Mr. Lowande, which he removed. It is unnecessary to discuss the Lowande incident at length, although it is extremely interesting, and shows that

the attitude of the Borough President is one of great favoritism. It will be found in the testimony of Mr. Lowande (p. 2082, Printed Record). It is the incident upon which Mr. McEntegart was tried by the Borough President upon charges preferred by Mr. Lowande. Mr. Lowande specified twenty-seven or twenty-eight different locations at which stands were being maintained in violation of law. Mr. McEntegart says that in many cases the charges were well founded, and that the stands which he claimed to exist did exist in violation of law (p. 2010). When they came to his knowledge he took action in respect to them, although the removals were not made in many cases for a month. He says as to this (p. 2017) : "I removed all I could downtown, and that tied me up on my daily work, and I stopped, and then President Ahearn spoke to me and says, 'Why don't you go ahead and finish up that work?' I says, 'I can't, because I have to attend to my daily work.' He says, 'You must go ahead and remove those stands.'"

He also stated (p. 2019), in answer to a question if there was any reason why he could not have gone ahead in the beginning,

"Well, I couldn't have done that unless I had received instructions from Mr. Ahearn.

"Q. In a grave situation of that kind, why didn't you go over and get those instructions from him at the beginning?

"A. Well, I don't know why I didn't do that.

"Q. You could not take that action without direct permission from the Borough President, could you?

"A. No, sir; certainly not."

And again (p. 2021) :

"Well, then, in order to get efficient work out of your contractor over there, you have to have the direct direction of the Borough President personally; is that right?

"A. I didn't say that.

"Q. Well, is that so?

"A. You can judge that from my answers."

In fact, the encumbrances in question appeared again immediately after their removal (p. 2117, Printed Record).

It also appears that many of the complaints made to the Bureau were held up and no action taken by reason of the intervention of other persons. On a complaint of a barber pole at 257 West Forty-second street there is a notation of the initials of "T. P. S." These initials Mr. McEntegart testified stand for "Timothy P. Sullivan" (p. 2031). The fact that Mr. Sullivan intervened may reasonably be supposed to have had something to do with the fact that the barber pole was not removed. Another complaint, on which the initials of "J. J. M." were endorsed, which Mr. McEntegart testified for "John J. Murphy," was marked "Fictitious" by himself. He came to the conclusion that the case was fictitious because the complaint came over the telephone (p. 2034). Another case of a complaint of some wagons and trucks on the sidewalk at the corner of Fifty-seventh street and First avenue bears the notation of the name of John B. Coggey, Alderman. This Mr. McEntegart testifies may have caused delay in its removal from November 9th to November 23d (p. 2039). On another complaint of a violation of the law on the sidewalk at the corner of Frankfort and North William streets, no action was taken at the request of the secretary of the Borough President, Mr. Downing (p. 2049). As to another complaint of an obstruction in front of the premises 1497 Broadway, a letter appears of record headed "Tammany Hall, January 14, 1907," addressed to the Superintendent:

"MY DEAR TOM :

Will you kindly take care of the enclosed for me, and much obliged,

Yours very truly,

By reason of that request no action was taken on the complaint (p. 2054). A similar case relates to an obstruction at the corner of Sixth avenue and Forty-fifth street, where no action was taken at the request of Mr. Alderman Brown (p. 2055).

Mr. Brady, the Clerk of the Bureau of Encumbrances, testified at page 2042, that it often happens that when a complaint is made and a notice has been issued that his Bureau gets requests from outside persons not to take action, and "Those requests sometimes come from the executive office of the Borough President in this building, do they not? Yes, sir." It frequently happens that a note is made from whom the requests come by a lead pencil notation in the corner, and that such lead pencil notations were made in the cases as to which Mr. McEntegart testified (p. 2043). He specifically identifies the initials of T. P. S. as standing for Timothy P. Sullivan, and J. J. M. for John J. Murphy, and he said further that unless the complaint in these cases was pressed the encumbrances would not be removed, and he gives (pp. 2105-2117) a number of instances in which no action was taken upon the complaints, although it appeared that the matter complained of was a violation of law.

Mr. Thomas J. McFall, an accountant employed in the office of the Commissioners of Accounts, testified that he had made an examination of the complaint records of the Bureau of Encumbrances with a view to determining what action the Bureau took upon the complaints, and that he found many cases of a similar nature to those testified to by Mr. McEntegart and Mr. Brady upon which no action had been taken (pp. 2120-2123).

The Bureau of Buildings.

The charge relating to the Bureau of Buildings is twofold. It rests, so far as the form of charges

is concerned, upon the incompetency of Mr. Murphy. One portion of it relates to the waste of money in the inspection of and certification of Mr. Dunn's bills, and the other relates to the action of the Superintendent of Buildings in passing upon plans for alterations of buildings in violation of the Building Code.

The evidence in the Printed Record, and the statements contained in the report of the Commissioners of Accounts, concerning the apparent overcharges in Mr. Dunn's bills, were not denied by the Borough President, and it must be assumed that they are correct. Briefly stated the facts are these:

All the work in this bureau is done upon a blank form of order under which Mr. Bartholomew Dunn, the favored contractor, is directed to proceed to the premises named and do whatever may be necessary to render the building temporarily safe. All the work for which he charges is paid for by the city, unless the building has been condemned as unsafe by judicial proceeding (p. 3142, Sten. Min.). There never has been any record of inspection by which the bills returned by Mr. Dunn could be properly checked. They were checked by inspectors who pretended to have examined the work, but the only record which they kept was a private memorandum on any scrap of paper which they may have used (p. 2152, Printed Record). In April, 1907, after the investigation of the Commissioners of Accounts had been begun, Mr. Murphy devised a time-sheet system, which is a record of the time on each job, from which Mr. Dunn's bills may now be checked up (p. 2158, Printed Record).

In the case of a bill of Mr. Dunn for work done at 186-188 Wooster street December 18, 1906, the bureau records taken from the reports of the inspectors show 292 riggers employed on the work, 5 truckages and 54 watchmen, while the bill sub-

mitted by Mr. Dunn makes a charge for 320 riggers, 9 truckages and 62 watchmen. It also shows that it had taken 8 watchmen at a time to watch 46 pieces of lumber and picks, shovels and tools (pp. 2177, 2188, Printed Record). In the case of a bill of Mr. Dunn of April 16, 1906, the returns of the inspectors show no riggers on the job, while the bill charges for 178 days of riggers. The inspectors' reports do show 178 days of shorers, but the cost of a rigger to the city is \$5.50 a day, while the charge for a shorer is only \$4, representing an overcharge to the city of \$267 (pp. 2189-2192, Printed Record). In the bill of Mr. Dunn rendered March 1, 1906, he charges for 93 shorers and 40 laborers. The inspectors' return is 80 shorers and 36 laborers (p. 2195 of the Printed Record). In the bill of Mr. Dunn dated May 23, 1906, he charges for 12 foremen shorers and 107 shorers, but these shorers had only one piece of timber to do the shoring with (pp. 2196-2199, Printed Record).

No inspection is made as to the ultimate disposition of the material which the contractor uses and charges for, and so far as the Superintendent of Buildings knows it may be used by Mr. Dunn—at all events on each new job he charges for new material (p. 2206, Printed Record). Mr. Dunn testifies (p. 2530, Printed Record) that the timber used for shoring is of use for some purpose and also for shoring again. It is a matter of common knowledge that it is so used.

In the case of the Darlington disaster, the steel was stored in Mr. Dunn's stoneyard and a charge was made of \$3,202.50 for 3 watchmen for 61 weeks at \$17.50 a week for watching it. On these watchmen Mr. Dunn charged a profit of \$2.50 a week. The necessity for that number of watchmen to watch steel beams for that length of time is not apparent, but the place of storage seems to have

been peculiarly unsafe for, as Mr. O'Neill, his employee, testified, "And even then we found "people came there and overpowered that watchman and hooked on to some of that steel, and was "taking it away in the middle of the night, had "teams of horses hooked to them." The steel occupied only a portion of the stoneyard, and it does not appear that Mr. Dunn's own property in the same yard needed this watching. The charge to the city for the storage of these steel beams was \$5,600; the proportionate part of the rental of the lots paid by Mr. Dunn was \$816.66 (pp. 2556-2558, Printed Record), a profit of \$4,783.34. The profit each month of \$341.66 was six times the monthly rent of \$58.66 paid by Mr. Dunn.

The charge of Mr. Dunn for these two items, \$8,802.50, was brought to the attention of the Borough President by the Comptroller in a letter in which he says that a voucher has been filed by Mr. Dunn "for the sum of \$8,802.50 for the storage of "steel in the big hotel Darlington for the period "of March 2, 1904, to May 1, 1905. Kindly furnish "this office with full information concerning the "claim, together with all papers in your possession "bearing thereon" (p. 3689, Sten. Min.). It is, we believe, the single letter of the Comptroller which the Borough President admits that he saw. It excited no interest or inquiry on his part, however. Whether the information was or was not procured he does not know (p. 3690, Sten. Min.). A very simple investigation would undoubtedly have disclosed the facts, and he is surely chargeable with negligence and waste in omitting to make it.

All of these bills were passed by the Superintendent of Buildings and Mr. Class without any apparent comparison between the reports of the inspectors and the charges in the bills.

The other criticism of Mr. Murphy relates to his action in passing upon plans for alterations of

buildings in violation of the Building Code. A number of instances of this character appear in the Printed Record. They were testified to by Mr. Murphy, the Superintendent (pp. 2217-2315), Mr. Roth, the Chief Engineer of the Bureau (pp. 2315-35, 2354-84); Mr. Miller, Consulting Engineer (pp. 2656-2674); Mr. Dewey and Mr. Reid, Engineers (pp. 2335-54, 2384-96, 2396-2407) and Inspectors McGee (pp. 2407-13, 2479-85, 2567-85, 2627-8), Montague (pp. 2485-94), and McKeon (pp. 2495-2501). The facts are all of record in the applications and plans for alterations which are in evidence.

The authority for the inconsistent and variable actions on the part of the Superintendent of Buildings, as stated by him, is Section 2 of the Building Code, which is as follows:

“This ordinance is hereby declared to be remedial, and is to be construed liberally to secure the beneficial interests and purposes thereof.”

That means, if it means anything, that the ordinance is to be construed so as to remedy an existing condition, and to secure the beneficial interests and purposes of the ordinance for the safety of the public and occupants of the buildings affected. Mr. Murphy seems to understand that the ordinance may be construed to secure the beneficial (that is, money) interests and (money) purposes of the property owner, and to remedy his financial condition. If Mr. Murphy is honest in so reading the perfectly plain language of the section, he is, we submit, plainly incompetent for the important office which he holds.

In fact, the alterations or constructions of which criticisms are made were in no case remedial, but were of such a character as to render the buildings in question more unsafe than they were before the

alterations were made. Most of the applications relate to hotels, to which Section 105 of the Building Code is applicable. That section provides that—

“Every building hereafter erected or altered, to be used as a hotel * * * the height of which exceeds thirty-five feet (now, thirty-six and one-half feet), excepting all buildings of which specifications and plans have been heretofore submitted to and approved by the Department of Buildings, and every other building the height of which exceeds seventy-five feet, except as herein otherwise provided, shall be built fire proof.”

That section plainly means that any hotel building existing at the time of the passage of the ordinance, though it do exceed the height of 35 feet (or at the present time $36\frac{1}{2}$ feet), and is not fireproof, may remain such, but if any alteration be made in such a building—or in a hotel building by which it shall exceed 35 feet in height—the building must be made fireproof. That is the understanding of Mr. Miller, consulting engineer of the department (pp. 2659, 2660, Printed Record). And Mr. Miller testified that he generally gave his views on the matter to the superintendent, when he submitted the plans to him (pp. 2658, 2659, Printed Record). The superintendent was, therefore, fully advised of the fact that any other construction of this section was at least doubtful. Yet he never asked the advice of the Corporation Counsel (p. 2313, Printed Record), but proceeded to authorize alterations which enlarged the danger from fire in buildings which were non-fireproof.

We will not undertake to discuss all the applications and plans in evidence, or even any in detail. A reference to a few may be deemed sufficient to show the character of the criticism.

61-65 Lexington Avenue: In 1904 it was proposed to add the two buildings 63 and 65 Lexing-

ton avenue to the corner hotel building, 61 Lexington avenue, over 35 feet high. The buildings were to be torn down and rebuilt, and the additions were to be fireproof. The application was disapproved by Superintendent Hopper, upon the ground that by the connection they would become a part of a non-fireproof hotel. An application made in 1906 for a connection of the existing buildings was approved by Mr. Murphy, although the application also showed that the alterations would be such that the new buildings would have no exit to the street, which is contrary to the Code (pp. 2231-2250, Printed Record).

873-879 Broadway, corner 18th Street: This was a building over seventy-five feet in height. The application was to increase its height by adding another story. The application was first disapproved under § 105 of the Building Code. The provision was subsequently waived by Mr. Murphy, in consequence of a request from Mr. John L. Jordan, who was Deputy Superintendent of Buildings under Mr. Stewart, Mr. Thompson and Mr. Hopper (p. 2323, Printed Record), because, as Mr. Murphy states (p. 2275, Printed Record): "After 'reading that letter, I thought, in my judgment, 'that the party asking for that modification was 'entitled to it.' This was, we submit, a plain violation of the law, and not subject to any quibble about the alteration of an existing hotel.

51st Street & Eighth Avenue: This application contemplated the addition of a one-story extension to a hotel. It was first disapproved under the provision of § 105, and afterwards the objection was waived.

158 East 23d Street: This was an application for a fireproof extension in the rear of the Hotel St. Blaise. The application was disapproved because it would be an extension in area of a non-fireproof structure. This was a ruling in accord-

ance with the law, and was at variance with the previous rulings cited. A request that the objection be waived was disapproved.

The Hotel Woodward: This added a non-fireproof tenement as an annex to a fireproof hotel. It did not concern the extension in area of a non-fireproof hotel. It, therefore, came strictly within the terms of § 105 of the Building Code, that the alterations shall be built fireproof. It was, nevertheless, approved. The builders are Murphy Brothers, the brothers of the Superintendent (p. 2383, Printed Record).

451 & 453 West 28th Street: This was an application to erect a new building to be used as a studio. Studio buildings are classified as dwelling houses, and as such they cannot cover more than 90% of the lot area. The plans showed that the proposed building did cover more than 90% of the lot area. Mr. Murphy admits that a mistake was made in approving this application. The owner and builder was Mr. John L. Jordan (pp. 2289-2292, Printed Record).

There are numerous other objections which were made to the applications and plans in evidence which were most important. But in the cases specified, we have referred to the most salient point, and by omitting a discussion of the remaining cases or the remaining objections, we do not mean it to be inferred that they are not equally worthy of discussion. But the cases cited indicate the general course of procedure in the department. They also indicate that the head of the department is not competent to administer the work of the bureau. A Superintendent of Buildings has almost autocratic power, and the power ought to be exercised without favor. As a matter of fact it has been exercised with great favor to individuals.

The Appointment of Inefficient and Incompetent Subordinate Officers and Employees.

The charge is that the Borough President has appointed incompetent and inefficient subordinate officers and employees, and has continued them in office after their inefficiency and incompetency had become known to him, or could readily have been ascertained by him, and the persons particularly specified are Mr. Walker, Mr. Scannell, Mr. Olney, Mr. Boyhan and Mr. Murphy, all except Mr. Olney, Chief Engineer, superintendents of their respective bureaus.

The evidence concerning these officials and their acts is scattered through both the Printed Record and the testimony taken before the Governor, and it is unnecessary to recapitulate it, except perhaps in the case of Mr. Boyhan. The Borough President has admitted that Mr. Walker and Mr. Olney are incompetent by removing the one and asking for the resignation of the other. Mr. Scannell was his friend and he did not remove him, although there was more reason for his removal as Superintendent of the Bureau of Highways and the person directly responsible for its workings, than there was for the removal of either Mr. Dalton or Mr. Olney.

Mr. Boyhan was not produced before the Governor, nor was any evidence given touching his testimony before the Commissioners of Accounts, which appears at pages 1575-1653 of the printed record. He testified that he does not know the duties of the Superintendent of Construction in his bureau, nor who is the man that bears that title (p. 1588) ; that he exercises no personal supervision or control as Superintendent of the Bureau, but there is a general inspector under him who has charge of that work, and sees that the work is properly done (p. 1593) ; that he does not find out whether the work of his bureau is done, but accepts the report of the

persons in charge of it; that he does not direct the engineers what to do, because their duties are of such a character that he has not the ability to direct them what to do. He transmits their reports to the Commissioner of Public Works (p. 1601). All he has to do with an order for work is to sign it, and all he has to do with a requisition for supplies is to forward it (pp. 1603-1605). He is frank enough to say with respect to the contract work:

“Q. Would you be surprised to learn that the Hickey Contracting Company had done \$38,000 worth of that work on non-contract orders in the year 1906? A. Why, there is nothing that would surprise me.

“Q. Why is that, Mr. Boyhan? A. Because I am kind of callous; it is hard to get me warmed up.

“Q. Do you consider that a class of work that amounts to \$38,000 in a year would be better let at public letting or better placed by non-contract orders? A. Well, that would naturally depend upon probably who got the job.

“Q. Upon who got the job? A. Yes.

“Q. If the right man got the job, it might better go out on non-contract order? A. If he would do his work well” (pages 1628-1629).

He has no idea what a four-foot brick sewer or a twelve-inch pipe cost per foot, and he could not tell whether a price named on an estimate is right or wrong. He had inquired, and ascertained that it cost \$50 or \$25 to clean a sewer basin, and he thinks that his gangs of men could probably clean out a couple of basins a day. He is compelled to admit that the cost of cleaning out two sewer basins upon his estimate of time would not exceed \$18, but says: “Why, if that is correct as to those two basins being done in a day, why the rest is money to run the bureau.” He is very glad to hear that his sewer force cleans four sewer basins a day, and that

the actual cost to the bureau is about \$4.50 a basin (pp. 1638-1646). His actual day's work is "receiving reports, receiving complaints, referring "the complaints to the proper official to pass upon "them, issuing permits, making requisitions and report to the Commissioner of Public Works the "transactions of the office" (p. 1651). This is but a brief abstract of his testimony, but it is sufficient to show that he was, as Mr. Dalton says of himself, "doing an officeboy's work." His "many years of service in an administrative capacity," which the Borough President certified to the Civil Service Commission as his qualifications for office (p. 3426, Sten. Min.), do not seem to have furnished him with much experience in administration.

The Borough President had read Mr. Boyhan's testimony. He had a copy sent to him of the evidence taken by the Commissioners of Accounts, and he says that as he was the most interested person he does not think anything escaped him. But after reading Mr. Boyhan's testimony he still thinks that Mr. Boyhan has sufficient knowledge and qualifications for his office (p. 3685, Sten. Min.).

Neither Mr. Scannell, nor Mr. McEntegart, nor any of the predecessors of Mr. Boyhan, was produced by the Borough President that the Governor might himself determine whether or not he was efficient and competent, or that his bureau was properly conducted. Nor, indeed, was the person who presumably at the present time knows more about the condition of the Borough President's office than any other person, namely, Mr. Thompson, produced by the Borough President. Mr. Thompson could have told of the conditions which he found when he took office in all the departments, and the measures which he was compelled to take to bring them into some sort of order. We may properly conclude the reason to be that Mr.

Thompson's evidence would have been detrimental to the defense of the Borough President.

The Borough President made no inquiry into the qualifications of his appointees to office. Mr. Scannell had been a clerk in the Surrogate's office for 15 years, and presumably knew nothing about the highways (p. 3411, Sten. Min.). Mr. Donahue, whom he appointed Superintendent of Sewers, was a plumber whom he had known for 15 or 20 years. He knew nothing about Mr. Donahue's capacity as a plumber (p. 3412, Sten. Min.). Mr. Coggey, Mr. Donahue's successor, had been connected with the dry-goods business of H. B. Claffin & Co. (3417, Sten. Min.), and he knew nothing specific about Mr. Donahue's duties there. Mr. Boyhan was Deputy City Clerk, and the Borough President thought that Mr. Boyhan had been once in the contracting business and then a lawyer (pp. 3418-19, Sten. Min.). Mr. Hagan, Assistant Commissioner of Public Works, had been an inspector in the Board of Excise, an attendant in the Court of General Sessions, and a Warden in the Department of Corrections. Mr. Hagan's qualifications for this office were "that he possesses the required ability to properly discharge the duties of the above-named position" (p. 3431, Sten. Min.). The real qualification of each of these men was, however, that each of them was a district leader in the Borough President's political party.

The Administration of the Borough President's Office.

It is manifest from the Borough President's testimony that he had no purpose of conducting his office for the benefit of the public. He did not give the consideration to its duties which the Charter contemplates, nor does he in many cases know what those duties are. He had favored contractors in every bureau, and these contractors almost invar-

ably had political affiliations with his political party, and were his friends. We have already referred to certain of them in the Bureau of Public Buildings and Offices. In the Bureau of Sewers, the Hickey Contracting Company received all the orders. The Hickey Contracting Company was Mr. Kenny. The Borough President has known him as a boy. He was a son of Deputy Chief Kenny of the Fire Department. He was raised in the Thirteenth Ward, which is adjacent to the old Seventh Ward, where the Borough President himself was born. The Borough President knew his father, was interested in his father and his family for a number of years. The Borough President made no inquiry as to his responsibility, or as to whether the Hickey Contracting Company had any plant to do the work, before giving him his first order (pp. 3677-3680). There was no administrative reason why the Borough President should not have continued the contractor who had had the work under Mr. Cantor, and who had a plant necessary for the work.

In the Department of Buildings the contractor was Mr. Thomas J. Dunn. He was another Tammany leader whom the Borough President has known a great many years. He was in the blue-stone business, and at the time of his selection he had no plant necessary for the removal of unsafe buildings (pp. 3685-3690, Sten. Min.). There is no administrative reason why the Borough President should not have continued the contractor who had the plant and did the work under President Cantor. His professions of regard for Mr. Cantor's appointees made in connection with Mr. Walker's appointment, are robbed of all their force by appointments of this nature.

In the Bureau of Encumbrances the favored contractor is Mr. Patrick Corrigan. The Borough President has known him 25 or 30 years. Mr. Cor-

rigan asked for the job and received it from the Borough President. He was also one of the contractors who had monthly orders. So far as the Borough President knew there was no check upon Mr. Corrigan's charges (pp. 3693-3696, Sten. Min.).

It is also apparent that the Borough President exercised absolute control over the entire business of his Department. This is the testimony of Mr. Dalton before the Commissioners of Accounts, and it also appears from the testimony of other witnesses, including that of the Borough President himself. He testified that he always had daily reports from and interviews with the heads of his bureaus, and the testimony of the heads of bureaus is to the same effect. Mr. Olney so testified, and Mr. Walker so testified. Mr. Boyhan testified (p. 1631, Printed Record) that he reported personally to the Borough President every day

"on the general subject of the bureau
 "that I was in, that is all, generally, and
 "the reports went from our bureau to the
 "Borough President's office, he was in-
 "formed as to the business transacted in
 "that bureau * * * about the condi-
 "tion of the sewers, which was the only
 "thing I had anything to do with, and the
 "conduct of the men in that office. * * *
 "I would call at his office and see him at his
 "office, and have a personal interview with
 "him."

We have already referred to the testimony of Mr. McEntegart that the Borough President exercised personal supervision over his bureau.

Mr. Loomis testifies (p. 1661, Printed Record), in answer to a question as to who is the person who exercises any executive direction or control over his work:

"Well, I suppose it comes finally in the
 "last analysis from the President of the

“Borough, because that is where my orders come from; occasionally I have got orders from the Commissioner of Public Works, he frequently acts as President of the Borough, I have got orders in that way, and sometimes orders from him while he is simply acting as Commissioner, occasionally.”

All permits were by his direction signed by the Borough President. He actively exercised a power of supervision of the personnel of the employees in his department, as, for instance, in the matter of the transfer of laborers. He had much to say about the quantity and character of his duties, such, for instance, as the demands upon him as a member of the Board of Aldermen and member of the Board of Estimate and Apportionment, and the time spent in the discharge of his duties. It appears, however, that he did not attend the meetings of the Board of Aldermen regularly, although any time they wanted him he was where they could get him (p. 3697, Sten. Min.). The local boards and the Board of Aldermen met on the same day, the local boards sitting for about one hour and a half. He did not attend all their meetings, but the Commissioner of Public Works frequently attended in his place (p. 3698, Sten. Min.). The Board of Estimate and Apportionment met once a week, sitting about an hour and a half or two hours (p. 3699, Sten. Min.). These attendances comprised all of his legislative duties, unless he was engaged upon some special committee of the Board of Estimate and Apportionment. The balance of the time he had for his administrative duties. He did not attend at his office on Saturday, but testified that he used that time to inspect buildings under his jurisdiction. It is not plain how he could have done so with so little tangible result. If he had inspected them properly, a large amount of the expenditure which was made upon

them would, in all probability, have been foreseen and avoided. If he had given the same amount of time to the inspection of the streets which he purports to have given to the inspection of public buildings, it is manifest that he would have ascertained for himself the condition of the streets to have been nearly as bad as he found it to be in May, 1907, and that he would have ceased long before to have had that implicit confidence in his Chief Engineer which he had up to May, 1907, and which led him, for instance, to say that if Mr. Olney had certified that double the amount of the contract price of the United States Wood Preserving Company should be paid to that company, he would have accepted his certificate without question (p. 3713, Sten. Min.). It is plain that he was forced to remove the officials whom he did remove only because he thought it was necessary to save himself. This is apparent irrespective of Mr. Dalton's testimony, because he received the pamphlet of the Bureau of City Betterment in November, 1906. This contained such an indictment of his office that he was led to ask for the investigation of his office by the Commissioners of Accounts, but he did not himself undertake any investigation of it. If he had been really in earnest in seeking knowledge of its condition, it is inconceivable why he did not do so. The facts brought out by the Commissioners of Accounts upon their hearings were facts which could have been brought out more readily by him from his own subordinate officials than by them. Apparently the crime of his subordinate officials consisted, not in doing the acts which he now repudiates, but in being publicly found out. When they were publicly found out, and not before, were they removed or dismissed. He himself refused to testify before the Commissioners of Accounts, although in the nature of the case he should have been anxious to vindicate him-

self if he could have done so. He is a trustee for the public. The public, through its properly constituted officials, is entitled to inquire of him at any time as to the conduct of his office. This is a fact which it was his duty to recognize. He did not recognize it before the Commissioners of Accounts, nor did he recognize it before the Governor until compelled to do so. In a sense this attitude is of itself a confession of the truth of the charges.

PERSONAL RESPONSIBILITY OF MR. AHEARN.

This branch of the case will be considered in two aspects; first, Mr. Ahearn's personal responsibility for certain specific acts or omissions to act, and secondly, his excuses or defenses generally and with some reference to the views of the courts.

SPECIFICALLY.

The Highways.

Mr. Ahearn declares, in his sworn answer, that stone foundations are the main cause of the dilapidated condition of the highway surfaces. He calls them "improper" (p. 106). Engineer Olney said that if the specifications were changed, and concrete substituted for stone foundations, the difficulty would be removed (p. 317). It was afterward shown that the specifications are without reference to whether the foundations should be concrete or stone, that the Borough President himself determined the form of contract that should be used, and that the form of contract does specify either stone or concrete foundation, as the Borough President determines. Mr. Olney further said that he did no repaving whatever except on requisition of the Borough President (p. 188). Olney said further that he had known of the need of concrete foundations for years, and had spoken to the Borough President about it as early as 1904 (p. 317).

In the spring of 1905, after a conference with the Borough President, they repaved Park Row on concrete foundations, Olney making the point to Mr. Ahearn that it would be "cheaper in the end" (p. 319). Yet, since that time, twenty to thirty miles of asphalt pavements have been laid in the Borough of Manhattan on stone foundations every year (pp. 319, 320).

Mr. Ahearn sits in the Board of Estimate and makes the argument on behalf of his department for appropriations in the making of the budget. It became necessary annually to obtain an appropriation for repairs to streets out of maintenance and make an annual contract therefor. Mr. Ahearn should have put himself in a position to make clear and unassailable his statement of reasons for this appropriation. The only possible method would have been to have maintained a careful inspection of the streets, or, at the least, to have sent out for that purpose a corps of inspectors at about the time the estimate was made. At page 216, counsel for the respondent made the claim that this was the method pursued. Mr. Olney, however, later admitted that the estimate was practically guesswork, and that there was no such system of inspection, that it was based on a certain arbitrary percentage of the mileage out of maintenance (pp. 352, 380). Mr. Olney stated that the Borough President gave him instructions directly (p. 218).

It does not appear that Mr. Ahearn ever did a thing to equip himself with the information necessary for this purpose. Your Excellency asked Mr. Littleton (p. 218) to bring out the system by which the Borough President knew the condition of the streets and the data for the estimates. Counsel remained silent and never did produce anything of the sort.

Mr. Ahearn never did anything whatever to render more efficient the system of inspection. Mr.

Olney told the Borough President, in a written report in October, 1906 (p. 230): "The Bureau is much in need of a more efficient system of inspection." He further said that the Borough President himself made all appointments and assignments to work (p. 303). Said Mr. Olney, the Borough President never asked about the quality of the men (p. 350). Mr. Olney told Mr. Klein, engineer for the Commissioner of Accounts, that fifty per cent. of his inspectors were incompetent, but Mr. Olney would not admit that he had placed the percentage beyond twenty-five. He found this out in 1905 and it interfered greatly with his administration, but none of them was ever discharged (pp. 346-348).

Mr. Ahearn never made any attempt whatever to provide a system of inspection of street defects. Mr. Olney said that there was no inspection at all, except on the complaints of citizens, and of these there were many. In the fall of 1906 they attempted to inaugurate a system, but it was not until this investigation was on, in 1907, that they put on any number of inspectors for this purpose.

Mr. Ahearn required that notices to contractors under contract to repair streets should be signed by him and should be sent from his own office. He therefore should have known that no notices whatever were ever sent to the contractor who had the annual contract to repair streets out of maintenance (p. 382).

Mr. Ahearn sat in the Board of Estimate and heard the debate of Mr. Littleton and the report of Mr. Tilson in opposition to his restrictive form of specifications, and signed the report which deliberately excluded Trinidad asphalt as then supplied commercially, and therefore must have known that he was driving out of business the Hastings Company, the only company that was in a position to bid for a contract to repair asphalt block streets

out of maintenance. As a result of this, 280,000 square yards of such streets went unrepaired for over a year, and part of them for over three years (pp. 397, 403). The DeBerard photographs show that these streets were in a dangerous and frightful condition.

Mr. Ahearn sits in the Board of Estimate and confers with his colleagues, and must have known of the appropriations for the construction and maintenance of an asphalt repair plant in the Borough of Brooklyn. There is none in Manhattan, and there has been no attempt to procure one, so far as the record shows. In reference to such plant, Engineer Tilson said:

“Q. It gives, in a certain sense, then, a club over the contractor? A. It makes it possible to get the work done.

Q. It enables the Borough President to take advantage of that clause which says that he will step in and do the work if the contractor does not? A. Yes” (p. 1111).

Perhaps the most flagrant instance of Mr. Ahearn's personal culpability in regard to the highways was his treatment of the fire-burns following the election of 1906. It was not a case of surprise or want of experience. He had been all through it a year before. He and the Corporation Counsel conducted an investigation, in which two volumes of testimony were taken, in the spring or summer of 1906, to determine the truth or falsity of the report of the bureau inspectors of fire-burns in the fall of 1905. Although Olney had warned him as to these inspectors, and had told him that his department was crippled as a result of their incompetency, these same men were put to work, after the election of 1906, to locate and measure the fire-burns. Olney said, at p. 231, that it was hard to tell a fire-burn, and at p. 345 that it was easy to tell a fire-burn. Be that as it may, Olney said

that the fire-burns of 1906 were "exactly" determined in two to two and one-half weeks after the election (pp. 335, 345). Upwards of 60,000 square yards of fire-burns were reported. The field books of the inspectors, offered in evidence, show in some cases that the inspectors located and measured and recorded four hundred different burns in a single six-hour day in streets widely separated. In some of the blocks the alleged burns were so thick that there must have been a continuous conflagration. These fire-burns were reported, according to Olney, about the 20th to the 25th of November. The weather for repairs was unexceptionable until the 17th of January, as shown by the weather reports. Absolutely nothing seems to have been done by Mr. Ahearn, either to reject this report or to accept it and see to the restoration of the highways, until, according to his own testimony, in the month of January following. At that time he started out three men, whom he called his confidential inspectors. It took them three months to bring in a report, and when it came in it showed just what any man of common sense would have known, that most of the fire-burns had been obliterated, and that the streets were so covered with ice and snow that these three men were obliged to rely on the statements of policemen and shopkeepers in the vicinity of the alleged fire-burns. Mr. Ahearn then sent for Messrs. Olney and Goodsell, who told him in April just what they had told him in November before, that their report was accurate, and Mr. Ahearn made poor Goodsell sit down and sign an iron-clad affidavit that everything was all right, when Goodsell did not know whether it was or not, and then Mr. Ahearn solemnly accepts the November report of Olney and Goodsell and orders the repairs at an expense to the City of New York of \$144,000. When Olney was put out of office, in May, 1907, the work was going on. The city paid

for these fictitious fire-burns at the rate of two dollars and upwards per square yard, in streets covered by maintenance, and the contracting companies in the streets under maintenance thus repaired at the city's expense thousands of ordinary wear and tear holes which they had contracted to repair at their own expense. It needs only an inspection of these field books to convince the examiner that they must have been filled in either as a result of the pure imagination of the inspector, or copied from some convenient record, such, for example, as that which would have been gladly furnished by the paving companies.

Mr. Ahearn concedes that in the spring of 1907, he discovered that the streets were in very bad condition, and that they had gotten away from his department, and that they were so bad that he removed, on that account, Messrs. Dalton and Olney. He professes to think that prior to that time they were in fair condition. But what is to be said of the testimony of the engineer in charge, Mr. Olney, that the streets at the time he was asked to resign were in better condition than they had been (p. 305). Mr. Olney also said that the storm of criticism on the condition of the streets was justified (p. 232).

The record shows that Mr. Ahearn did receive the reports of the Merchants' Association of 1904 and 1905, showing in detail the wretched condition of many of the streets. It appears that Mr. Ahearn made spasmodic efforts to see that his bureau should do better work. His conceded failure, however, to institute an adequate system of inspection of street surface defects is proof enough, in and of itself, upon which to base the claim that the Borough President made no effective effort to care properly for the highways in the earlier years of his administration.

Mr. Ahearn admitted that he was dumbfounded

when he discovered, after this investigation was begun, and at the time of the removal of Dalton and Olney, that there was no record kept by the bureau of repairs done by the companies from 1906 to date, and further, that the books were not posted. Is it conceivable that a borough president possessing even ordinary prudence and capacity would not have known this before a date in 1907 at which time the Commissioners of Accounts were investigating his office? When he was stirred up by the Merchants' Association in 1904, and again in 1905, and again in 1906, why did he not call for such a record? It must have been quite as indispensable to a determination by him as to the conduct of his department then as it was in 1907. As the Borough President himself bases his demand for reform in 1907 on the failure to keep such records, can he complain now if he is held culpable and grossly negligent for not having inquired as to these records in 1904 and 1905? Reform in 1904 and 1905 would never have been followed by this investigation and these charges.

Contracts and Specifications.

Reference has already been made to Mr. Ahearn's personal neglect, amounting, we submit, to misconduct, in deliberately entering into contracts for asphalt pavements on improper stone foundations, to the extent of twenty to thirty miles a year, after he had been warned and notified by his own engineer that only contracts providing for concrete foundations should be let, and that they were "cheaper in the end."

As to the specifications, Mr. Ahearn is, we submit, grossly culpable for obstinately retaining Section 61, in view of the monopoly that it concededly establishes. Mr. Ahearn claims that at the outset he did not know that it would create a monop-

oly. It is preposterous for him to say this, in view of the fact that he sat in the Board of Estimate and heard the argument of his eloquent colleague, Mr. Littleton, and the report of Engineer Tilson, that the adoption of the specifications certainly would create a monopoly and drive from competition companies using good asphalts. Mr. Ahearn admitted that he had no knowledge whatever on the subject of the specifications, and relied on his engineers. He not only refused to listen to Mr. Howard and Mr. Whinery, but when his colleagues in the Board of Estimate, Mr. Grout and the Mayor, insisted upon a report from Engineer Lewis, with a view of adopting uniform specifications for all the boroughs, Mr. Ahearn either never cared enough about the subject to see what the report was, or, worse still, knowing the report, continued his obstinate adhesion to Section 61. Mr. Lewis reported to the Mayor, in December, 1904, that oil asphalts, when properly tested, should not be excluded. He also told Your Excellency, on the stand, that if he had known at the time he signed the report that the effect would be to limit competition, he would not have joined in the report.

Mr. Condit's testimony shows that the average price of sheet asphalt, under the thirty-one contracts let in 1907 was \$1.63. In Brooklyn, it is \$1.27.

Repairs and Supplies.

Mr. Ahearn testified that he was wholly ignorant of what were and were not reasonable charges for supplies and repairs. His personal signature, nevertheless, appears upon thousands of vouchers certifying to the reasonableness of these charges. His signature, or that of the acting Borough President, is a prerequisite to the payment of the city's money in discharge of this class of indebtedness.

With what must have seemed to Your Excellency almost cynical indifference, Mr. Ahearn stated over and over again that he relied upon the statements made to him by his subordinates in affixing his signature. It is conceivable that this course would be justifiable if it were shown that, in the selection of his subordinates, he had observed due care to obtain the most skilled and competent men available, and thereafter had, from time to time, personally examined into the methods of issuing orders, and the inspection of the supplies when received or the work when performed. We shall discuss hereinafter his method of choosing his subordinates. As for sitting down with them, from time to time, and painstakingly pointing out the methods to be pursued, there is not the slightest evidence that he ever attempted such a thing. If he had done so, is it conceivable that he would never have heard of the excessive charges of the Metropolitan Equipment & Supply Co. "until the other day" and during the taking of testimony before Your Excellency? Is it conceivable that he would not have discovered the relations that existed between Walker and his sons, and Boyce and Tydings, and the mythical Lynch? Is it conceivable that he would never have heard of letters from the Comptroller complaining of violations of § 419?

Mr. Ahearn testified that complaints from citizens generally, relating to the condition of the highways, coming to him through the mails, were opened by his secretary and given to him. He then made the amazing statement that letters from the Comptroller, containing complaints of violations of § 419, were opened by his secretary, but never, in all the four years, was one shown to him. This secretary, Downing, who was daily before Your Excellency throughout this investigation, but was not called to the stand, was said to have sent them directly to the bureau heads affected. Why did

not the complaints concerning the highways, received in precisely the same manner, go directly to the head of the Bureau of Highways? If this testimony is to be credited, it displays an amazing lack of grasp by the Borough President on the affairs of his own central office. These letters from the Comptroller were not, in every case, of a perfunctory nature or in circular style, but were specific and dealt seriously with grave charges. Some of them became embodied in a report to the Commissioners of Accounts, for example, those relating to the Sayward case, where the repairs were made in the office of the District Attorney on successive open orders. And yet, as we understand it, Mr. Ahearn says that he never heard of any of these letters until this hearing before Your Excellency.

The truth is that Mr. Ahearn knew that he had not established in his department, or through his bureaus, adequate means for determining the reasonableness of prices, and that he deliberately passed on the work of inspection and audit to the Finance Department. Mr. Ahearn said: "I could not believe a mistake could pass the Finance Department without detection." In the first place, Mr. Ahearn had no right to shirk his fair share of responsibility in this way, and then again, if he did rely so implicitly on the Finance Department, why did he not interrogate his secretary who opened his mail, or the bureau chiefs, as to the fate of these vouchers and orders when they reached the Finance Department. The ignorance that he claims as to all that was going on is inconsistent with his professed confidence in somebody else's department to check up his own work.

When Your Excellency considers the excessive prices paid favorite political contractors, and the waste of the public moneys, this shilly-shallying

policy of the Borough President becomes most serious misconduct in office.

Either Mr. Ahearn knew of all these things, in which event he should, we submit, be removed for gross misconduct, or he did not know them, in which event he should, we submit, be removed for gross neglect. If he had made himself only moderately familiar with the affairs of his office and the methods of his subordinates, he would have seen what is now so obvious to him.

It will be conceded that the head of a great department, with manifold duties, must take much for granted and sign his name on faith many times, but must we say that he can appoint as his subordinates an incompetent set of political leaders, confessedly without special qualifications for their places, and then sit back idly and for four years rely on their unsupported statements in expending the city's money?

Organization and Accounting.

Mr. Ahearn testified that he made no attempt to reorganize the department when he assumed office, in January, 1904. He took things as he found them, and admits that he made no effort whatever to simplify the system of bookkeeping and copying of records. Here again the Borough President shields himself behind the powers of the Comptroller as to accounting. Assuming that it is the duty of the Comptroller to prescribe the form of accounts, this does not relieve the Borough President of responsibility for doing properly what is attempted to be done. We would not mention this subject if the Borough President and his counsel had not challenged the accuracy of the report of the Commissioners of Accounts, at page 24, in claiming that the records of the Borough President were worthless so far as they attempt to show the cost of maintenance of any building under the jur-

isdiction of the Bureau of Public Buildings and Offices. The only book they produced was a book for a single year, an examination of which they claimed would show a complete record as to the cost of all the buildings out of all funds, either corporate stock, revenue bonds, or from the annual appropriation. On cross-examination, it was shown that the book was merely a history of certain stock or bond issues as to a few of the buildings, and that even this history was incomplete. It was impossible to tell from the book what a single building had cost the City of New York for a single month or year during Mr. Ahearn's administration. Mr. Ahearn admits that he paid no attention whatever to this sort of thing. If Mr. Ahearn had been a careful and solicitous public official, would it not have been indispensable for him, in preparing and making his argument for the budget appropriations, to know precisely what was the annual cost of maintaining the public buildings in his care?

Incompetent and Unfit Appointments.

Mr. Ahearn himself testified, with evident inability to appreciate the effect of what he was saying, that in choosing Mr. Dalton as Commissioner of Public Works, Mr. Scannell as Superintendent of the Bureau of Public Highways, and Messrs. Donahue, Coggey and Boyhan as successive Superintendents of Sewers, that these men were all district leaders of the same party to which he belonged, and that they were without special experience or qualification for the duties which they were to be called upon to perform; that they were "new like myself, and had to learn." Dalton held a really great office, and it is evident from a reading of the charter that the Commissioner of Public Works is intended to be the actual, vital head of all the bureaus, except the Bureau of Buildings. The

answer of the respondent claims that the Commissioner of Public Works is the "immediate and efficient head" (pp. 95, 96). The borough president is not obliged by the Charter to name a commissioner (Mr. Ahearn testified that the Charter did compel him to name a commissioner) ; but if he does appoint a commissioner, he must at least give him something of importance to do, or, in this case, be chargeable with carrying on the pay rolls a district leader for purely selfish and political purposes. Col. Thompson, the new commissioner, Mr. Ahearn tells us, has been a most active and energetic head of all the bureaus under his control. The documentary evidence shows that Mr. Ahearn stripped Mr. Dalton of all responsibility and power, except during the last year as to the signing of vouchers, as to which Mr. Ahearn desired to shield himself from responsibility by imposing that duty on Mr. Dalton.

There is no doubt that Mr. Ahearn ordered Dalton to keep off the streets and to stay in the office. Mr. Ahearn is grossly culpable for permitting the great office of Commissioner of Public Works to be administered as it was during all of the period from 1904 to the appointment of Col. Thompson. Mr. Ahearn knew perfectly well that he was getting no aid whatever from Mr. Dalton, and this was due to one of two things, either Mr. Dalton could not aid Mr. Ahearn, or Mr. Ahearn would not let Mr. Dalton aid him.

As to Scannell, it does not appear that he could even be entitled to be called a figurehead. It was Ahearn and Olney that ran the Bureau of Highways. Witness the spectacle of all this painstaking investigation of the Bureau of Highways of the Borough of Manhattan, over a period of weeks before the chief executive of the State, and the Superintendent of Highways himself does not appear once in Albany, nor is a single reference made

to him by Mr. Ahearn or his counsel as a means of aid or information.

As to the line of Sewer Commissioners, particularly Boyhan, the climax, the picture is grotesque. Mr. Ahearn read the amusing testimony of Mr. Boyhan at the time it was given, and told Your Excellency that he did not regard that as justifying his removal. He might as well have said that he did not care if his Superintendent of Sewers were unfit for the place. Mr. Ahearn seems now to claim immunity from the fact that Boyhan has voluntarily, within a few weeks, resigned to accept a political nomination.

As to Walker, is it conceivable that a borough president, fit to retain the office, should have daily consultations, face to face with him, for four years, and not know that he should not trust him, and that he should not take his certification as to the reasonableness of the bills of Max Cramer, Boyce & Lynch, and Thomas Tydings?

It is perfectly obvious that the transfer of Stewart, an engineer in the Highways Department, to Walker's place is merely a temporary expedient, and there is no doubt that Walker hopes to return to the department.

The Bureau of Encumbrances.

Mr. Littleton, in demurring to the charges, declared that the charge as to political and personal favoritism in conducting the Bureau of Encumbrances was too "trivial" to notice. Mr. Ahearn, in his answer, intimates that the Commissioner should be removed (p. 126). The fact is, he has not removed him, and the excuse that he is protected by the Civil Service Law was shown to be baseless. Do Mr. Littleton and his client consider it "trivial" that action can be indefinitely postponed in this bureau by the intervention of influential persons, and that the initials

“T. P. S.,” meaning Timothy P. Sullivan, or “J. J. M.,” meaning John J. Murphy, when pencilled on a report were enough to cause the case in point to be dropped by the bureau? (pp. 2929-51, 2961-80, 2952-61, Com. of Accts., S. M.).

The Testimony of William Dalton.

Save in a few minor respects, the testimony of William Dalton, taken before the Commissioners of Accounts, stands unchallenged and undisputed. His testimony fixes, beyond dispute, upon the Borough President the personal responsibility for most of what we charge. For that reason, we call attention to the main features of his testimony under this head.

(a) Highways.

When Mr. Dalton took office, it is evident that he assumed that he would have something to do with the highways, as the Charter conferred upon him direct supervision over them. One day, shortly after he was appointed, he was sent for by Mr. Ahearn, who said to him:

“‘You have been off on some work to-day? Yes. Well, now, you don’t want to go out on this work; you want to stay in the office; don’t bother with this thing; you stay in the office; let somebody else attend to that business.’ I felt, having a horse and wagon the city was paying for, I ought to use it; I ought to be out; I told him that; I said: ‘I think, as Commissioner of Public Works, I ought to be on this work. Now, if I have been stepping on somebody’s ground and hurting somebody, tell me and I will get out and resign from the department.’ No, no, William, there is nothing like that; you stay in the office and you attend to that work.’ This happened, I think, on two or three occasions” (p. 1069).

One day, Mr. Dalton happened along Broadway and discovered that the concrete was not of sufficient thickness. He went to his office and ordered Olney to go down and look after it:

“That afternoon when I came over, I mentioned the incident to the President, and he said to me then: ‘I told you before, now, you ought to stay in the office and look after the office there; stay in the office and look after your office work; let your men look after that.’ I said: ‘A boy getting \$6 a week can attend to my office work’” (p. 1070).

Ordered to stay in his office and attend to office duties, Mr. Dalton describes his office duties:

“Q. And those office duties, you say, were restricted to the transmission of papers?

A. Yes, sir; the transmission of papers, there was quite a number of them, and quite a lot of other little things that came along, quite a number of letters that came in in the course of a day, and answering those letters, transmitting them to different Bureaus and getting answers, and lots of things” (p. 1080).

Mr. Dalton said that, although the President instructed him not to interest himself in inspecting the streets, “I do not know of any inspections” by the President himself (p. 1083). Mr. Dalton’s notion of the way to enforce the maintenance contracts is illustrated by his testimony as follows:

“Q. Is an asphalt company ever supposed to repair a street until it receives a notice?

A. Yes, sir.

Q. Well, I mean is it supposed to repair a street without receiving a notice? A. Yes, sir.

Q. In what case? A. In all cases they are supposed to keep the street repaired at all times on the maintenance.

Q. That is where the guarantee of maintenance exists? A. Under the guarantee of maintenance, yes, sir" (p. 1108).

Such notices as were sent to the companies under these contracts were signed and sent by the Borough President himself. By letter of March 4, 1904, addressed to the Commissioner of Public Works, the Borough President wrote:

"Under the terms of the contracts with the various asphalt companies, it is necessary for me to sign all notices to the companies to make repairs to all asphalt pavement under guarantee of maintenance. You are therefore requested to transmit to this office for my approval and signature all such notices to these companies" (pp. 1108, 1109).

Said Mr. Dalton: "They are never issued without his signature" (p. 1109).

"The Borough President himself personally goes over the list of streets for repaving, and strikes off or adds to the list, just as he wishes, and decides on the kind of pavement to be used" (p. 1114).

As to the system of inspection, Mr. Dalton declared that it was incomplete, but I think "the new Commissioner of Public Works will have more power and he will see to it" (p. 1120).

The Borough President himself, in all cases, exercises his personal discretion in the letting of contracts for any kind of work in any of the bureaus (p. 1121).

As to the corporation permits for opening the streets, the Borough President took away from the Commissioner of Public Works all power. On the 4th of March, 1904, he wrote the Commissioner personally as follows:

"Dear Sir: On and after the receipt of this letter you are requested to transmit to

this office, for my approval, all permits to be issued to all corporations for removing asphalt pavement on streets and avenues, for the purpose of making hose connections for gas, electricity, etc., or constructing subways and for any other purposes" (p. 1107).

Not content with this, the Borough President followed it up by letter six days later taking away all power over all permits for an opening for a distance of greater than one block:

"No permit shall issue in such cases as herein specified unless it shall have the approval stated thereon of the President of the Borough" (p. 1076).

Mr. Dalton said he had no authority whatever over Scannell and Olney, or "other than to stay there in that office and sign all these letters and papers and transmit them from one bureau to another, transmit them to Mr. Scannell; I know of no other" (p. 1079).

Olney and Scannell reported directly to the Borough President (pp. 1066, 1075). The Borough President, in Dalton's presence, would tell Olney to see Scannell about matters (p. 1067).

The Borough President alone appointed the corporation inspectors (pp. 1105, 1106).

The Borough President alone appointed the laborers from the Civil Service list (p. 1106).

The Borough President never consulted with the Commissioner about any of the matters stated in any of the letters relating to permits, notices, etc. (p. 1113).

The Borough President himself appointed and transferred every cartman, teamster, laborer, rammer and paver. "I have sometimes signed a list of appointments, but it was because Downing, the secretary, told me the Borough President wanted it" (p. 2828).

Dalton says that he repeatedly called the Bor-

ough President's attention to the need of more laborers and less bosses in making the repairs to stone pavements, and also the need of a city asphalt repair plant, and also to the advisability of having the Bureau of Highways on his floor, so that he could have a closer supervision, but no action was ever taken (pp. 1058, 1066, 1118, 1119).

Mr. Dalton's position is that he was deprived of his proper functions by the Borough President, who failed to exercise these functions himself, and further, that the "feverish and theatrical activity since the recent developments of the investigation proves what can be accomplished in the brief space of a few weeks with the powers and financial means which have at all times been at his command" (pp. 1048, 1083, 1116).

(b) Repairs and Supplies.

Ever since Mr. Ahearn has been in office, orders for repairs and supplies have been given invariably to those that the President himself desired to have them. Prior to March 3, 1906, the names of the recipients of the orders either went up in blank or were filled in by the bureau heads, after consultation with the Borough President as to the selection of the names. "The bureau heads knew who the President wanted to give those orders to for supplies" (p. 1091). On March 3, 1906, in order to make his control over this more perfect, the secretary of the Borough President addressed a letter to William Dalton, as follows:

"You will please issue instructions to those in charge of the various Bureaus under your jurisdiction that future orders for work or supplies of any kind shall be drawn with the space for the name of the person to whom it is issued left blank" (p. 1081).

Mr. Dalton naturally disliked to do this, because he had to sign the order in blank and had no voice

whatever as to the selection of the recipient, and yet after the order went out, it would appear from the face of it that he, Dalton, had shared in the making of the choice. Nevertheless, the Borough President insisted upon it, and moreover insisted that the orders should be physically sent out from his office (p. 1087). The result was that the Commissioner was put in the position of issuing orders for work and supplies to whom he knew not, until after the work had been done or the supplies furnished, and he was called upon to sign the voucher. This applied to all the orders from all the bureaus (pp. 1090, 1091).

Superintendent Walker consulted directly with the Borough President. Walker told Dalton that the Borough President told him to (p. 1090). The bureau heads throughout the entire administration went directly to Ahearn for instructions as to supplies (p. 1050).

Mr. Dalton further said, as to these orders, that "not a dollar's worth of discretion of any kind was left with me. * * * If I should be Acting President for a day or two, why Mr. Downing was the President, the secretary, orders would come to me just as though I was an office boy" (p. 1099).

(c) Section 419.

Dalton swore that he called the Borough President's attention frequently to the O'Brien-Ryder orders (p. 1096), and the Borough President said that "the matter was all right as long as they were not on the same date on the same work, same piece of work. Q. He said it was all right as long as those orders were not issued on the same date for the same piece of work, is that it? A. Yes" (p. 1097).

All these orders were referred to the Borough President and he made the decision. The same applies to the Hickey Contracting Co. orders, and the

so-called emergency work by the Bureau of Sewers (pp. 1098-1101).

(d) Contracts and Specifications.

Dalton swore that the Borough President told his engineer just what to add or strike out from the specifications (p. 1115), and that the Borough President exercised his personal discretion in letting all contracts (p. 1121).

(e) Plumbers' Trust Fund.

The Borough President himself ordered the change in the charging of pay rolls from one fund to another, and the Borough President personally passes on the propriety of allowing repayment of the excesses to the depositors. Nobody else in the office had any authority or discretion in that matter, not even the bureau heads (pp. 1102, 1103).

(f) Appointments and Transfers.

The Commissioner of Public Works said he was supposed to be the executive head of all the bureaus (p. 1061), but he could not transfer a man from one room to another without consulting the Borough President (p. 1065). The Borough President appointed the Assistant Commissioner of Public Works (p. 1061). Dalton said:

“Nor had I, since I have been in the Department, the employment or the discharge of help, any one, not even from a woman scrubbing the floor up to the highest paid inspector in the department, no control at all” (p. 1051).

If he gave orders in such matters, they were countermanded in fifteen minutes, sometimes (p. 1049). “Even when I was deputed to serve as acting Borough President for a definite period, I had to act

under orders from his secretary, Downing" (p. 1079). Dalton had no power to make a change in the staff of his own office (p. 1111).

At one time, a man named Clifford had been transferred from the Highway Bureau to the Sewer Bureau, and when the work was finished, Dalton thought he ought to be retransferred, and had the hardihood to write a letter directing his return to the bureau to which he belonged. The moment the Borough President heard about it, he wrote Scannell that he "desired to know upon whose authority this transfer was made, and directs that Clifford be put back to his former position in the Bureau of Sewers" (pp. 1077, 1078).

(g) *Vouchers.*

But there was one field in which the Borough President gave his Commissioner great powers, and that was in the signing of vouchers. It is perfectly plain that when the Borough President began to scent danger to himself from the waste in the matter of repairs and supplies, he sought to evade his own responsibilities and impose them upon poor Dalton. Mr. Ahearn complained on the witness stand of having so many papers to sign, and accounted for his order to Dalton to sign the vouchers on that ground. It is to be observed that he did not countermand his orders of 1904 and later, imposing upon himself the burden of signing permits and notices to the paving companies, and filling in the names of the recipients of his favor in the field of work and supplies.

Mr. Dalton exposed the hollowness of all this in his impulsive statement that, while he could not transfer a man from one room to another in his own office, yet he was permitted to sign all these vouchers for large amounts. "No sane man would think the President would allow me to do that for two years, perhaps" (p. 1065).

Dalton worried over these vouchers. He could not understand why Mr. Ahearn should insist on his signing them when he, Ahearn, was sitting in his own office and had at his right hand Mr. Davis, a highly salaried auditor, and his private secretary, Downing, in order to assist in the examination, while he, Dalton, had no one, and had to sign the vouchers without any further information than was afforded by the certification of the bureau head (p. 1113). Dalton objected to this over and over again, but Mr. Ahearn reassured him by saying: "Now, William, that is all right. They are gone over very carefully by Mr. Scannell and Mr. Walker" (pp. 1063, 1074). The letter directing Dalton to sign all vouchers is to be found at page 2827.

Mr. Dalton's Removal, and the Manner of It.

Counsel for the petitioners have had no greater surprise in this investigation than the failure of Mr. Ahearn to make a denial of the testimony of Dalton as to the final conversations between them. We think we are quite within bounds in saying that these conversations furnish the most important piece of evidence offered in the investigation as bearing upon Mr. Ahearn's conception of the responsibilities of his high office, and the imperative need for his removal. These conversations are recited at length by Mr. Dalton, and repeated several times with very trifling variations, and we respectfully ask that they be read with care. They appear at pages 1044-1047, 1081 and 1123 of the Printed Record. He told Dalton that there were no charges against him, "not one wrong act," but he said: "William, something has got to be done to save me. * * * The only way to save me from being removed by the Governor is for you to resign. * * * This won't last long. We want to get a good man in there—a man who don't belong

to the organization, who the public will take up and the newspapers make a great time, and say, 'Ahearn is doing the proper thing,' and after a little while it will quiet down and you can come back again."

Then comes the most amazing thing of all, and that to which we call particular attention. Ahearn said to Dalton:

"Supposing that *something was put in your way* which would make up for at least your salary and more than your salary and you had nothing to do, wouldn't that be better for you?" "No," said Dalton. Then said Ahearn: "Now, I will show you how we can help you out. Here is supplies given out every day, and *here is one big job*; here is a poor fellow and I am very sorry to say he is not going to last long, and you can come in when he dies; *you get his share of the profits of that plumbing business.*" "Who is that?" said Dalton. Ahearn: "Mr. Ryder, who is to-day very ill, if not dead. You can get his share" (pp. 1046, 1123).

Dalton had never been a plumber.

Mr. Dalton did not offer himself to the Commissioners of Accounts to give this testimony. He came in response to a subpoena (p. 1047), and begged for the privilege of delivering his testimony *in the presence of the President of the Borough*. He demanded that no contradiction or denial of his testimony be accepted by the commission, the press or the public, unless made under legal oath (pp. 1047, 1048, 1070, 1071). "I would not have come here without a subpoena" (p. 1072).

In response to Mr. Littleton's suggestion that we could not use Mr. Dalton's testimony before Your Excellency unless he was produced for cross-examination, we produced Mr. Dalton twice in Albany. Once he was sent away because of adjournment. On his return the second time, Mr. Little-

ton, after consultation with his client and associate counsel, announced that he did not care to cross-examine him. Even after Mr. Ahearn had left the stand and had not denied under oath any of these statements of Mr. Dalton, counsel's attention was again called to the presence of Mr. Dalton, but he failed to avail himself of the opportunity for cross-examination.

To state it plainly:

Mr. Ahearn deliberately sought to save his own official life by making a deal with Dalton, his fellow district leader, the terms of which were that Dalton was to give way temporarily to make room for a reformer who would please the people "until things quieted down," in return for which Ahearn was to pay Dalton out of the city treasury by giving to him, who had never been a plumber, a plumber's profits on all the department's business done under open order.

If this is not misconduct in office it is difficult to say what it is.

THE DEFENSES GENERALLY AND THE LAW APPLICABLE THERETO.

The Highways.

The Borough President's answer contains the allegation that he has jurisdiction and control over the restoration of pavements removed *for any cause* (pp. 91-92); he points out, at p. 94, that no removal of pavements *for any purpose whatever* may be made without his permit.

Mr. Ahearn sought escape for the wretched condition of many streets on the plea that they had been opened and kept open by the Department of Water Supply, Gas and Electricity, and that other streets were under the jurisdiction of the Park Department, and that in other sections the Rapid Transit Commissioners were to blame. The testimony shows that the Borough President assumed

the responsibility, whether it was rightfully his or not, for some of the so-called "Park" streets. This will be seen upon an examination of the list of streets prepared in February, 1907 (Ex. 2). It will be observed also that in the same list he assumes jurisdiction over so-called "Rapid Transit" streets; for example, Long Acre Square, where the Degnon Co. had the contract (p. 195).

Engineer Olney testified that the Borough President "had the right" to make repairs due to openings by the Department of Water Supply, Gas and Electricity and charge the expense to the other department (p. 213). Under pressure, he partially retracted this (p. 214). But the fact remains that in the spring of 1905 the Borough President called a conference of his subordinates and insisted that the trenches opened by the Department of Water Supply should be filled and the pavements restored and assured his subordinates that he would get the money if this was done (p. 214). At this time the Borough President himself declared the streets were "in such an intolerable condition" that he would end the conflict with the Water Department and get the money from the Comptroller. Mr. Olney declared that since that time the Water Department had asked for permits for the opening of streets for departmental purposes and that there had been no trouble over the conflict with the Department of Water Supply, Gas and Electricity, except in the single case of the high-pressure mains which were for a time left unrestored owing to the delay in making final tests. It should be observed that these mains were laid within a very narrow district, south of Twenty-third street and west of the Bowery and north of Waverley place. It is apparent, therefore, that since the spring of 1905 the delay in the restoration of street surfaces and the atrocious condition of the highways in many sections of the city cannot be laid to the door of this

department. This would seem to end the defense of the conflict with the Water Department (pp. 326-328).

So far as the Rapid Transit Commission is concerned, Section 24 of the Rapid Transit Act is applicable. It provides as follows:

“In all cases the surfaces of said streets
“around such foundations, piers and col-
“umns shall be restored to the condition in
“which they were before such excavations
“were made, as soon as they may be, and
“under the direction of the proper local
“authorities.”

In the case of *People ex rel. Subway Co. v. Monroe* (85 A. D., 542), at pp. 547-548, the Court in the First Department said:

“Without definitely deciding the question, which, as has been stated, is not presented, it would seem that the President of the Borough is responsible for the condition of the surface of the streets and it is his duty to maintain the same in a safe condition for public travel. It is his duty therefore and not the duty of the Commissioner (speaking of the Commissioner of Gas, Water and Electricity) to see that excavations are properly guarded and that the trenches are properly refilled, and that the pavement is properly relaid.”

It is true that this case related to openings made by public service corporations, but there is no reason apparent to our minds why the same rules should not apply to openings made by the department itself—for example, for the purpose of laying a water main.

The Plumbers' Trust Fund.

The Borough President in his answer sets forth the ordinance of 1880 creating this fund and claims the sanction of the Finance Department for the payments that he has made out of it. When on

the stand he said that some one had told him recently that his payments were illegal.

The claim was made at the trial, and doubtless will be renewed, that Borough President Ahearn has followed a practice that has prevailed for many years and during the administration of his predecessors in office; in other words, the Borough President pleads prescription for violation of law. So far as the reliance on the Finance Department is concerned, the ordinance itself provides that the Finance Department shall audit and allow the charges against this fund only on the certificate of the Commissioner (now the Borough President) that the funds had been necessarily expended for repaving done pursuant to ordinance, that is, restoration of cuts (p. 118). So far as the excuse that, inasmuch as his predecessors had violated the law, so may he also, we think we do not need to discuss the question. The fact is that the Borough President has converted this fund, not to his own use, it is true, except indirectly in the sense that it has enabled him to swell his payrolls and to increase his patronage, but he has put it out of his power to restore to the depositors the excess that is rightfully theirs; in other words, it is a plain and flagrant abuse of a trust imposed upon him by law. Is there any difference whatever between his violation of this trust and the violation by bank officials of the trust reposed in them by bank depositors, when they make unsafe and discreditable loans?

That it is the sworn duty of a public officer to apply money to the purposes specified by law may be seen by reference to the following cases:

People v. Gillespie (47 Ill. App., 522).

Ealer v. Millspaugh (32 La. Ann., 901).

The Mayor v. Ivison (29 N. J. L., 65).

See also opinion of Corporation Counsel Pendleton, filed November 9, 1907, relating to this very subject of the plumbers' fund.

As to Violations of Section 419.

We do not ask for the removal of this officer for cases of violation of this section where there has been a real emergency or anything approaching to a real emergency or where there is any doubt as to whether there was or was not an emergency. We submit, however, that this record demonstrates that the Borough President and his subordinates deliberately and repeatedly violated the section without excuse.

A significant bit of testimony, illustrating the attitude of the Borough President himself upon this subject is shown in the uncontradicted testimony of Mr. Dalton that Mr. Ahearn said to him, there is no violation of the section unless you give the successive orders on the same day for the same piece of work (p. 1997 of the Printed Record).

The attitude of the Courts on this subject is well exemplified in the case of *Ellis v. The Mayor* (1 Daly, 102). In that case the Street Commissioner told the plaintiff to put up a retaining wall for the purpose of supporting the earth which the plaintiff had been placing upon the street in building a highway. The wall was put up at intervals along the street. Plaintiff's counsel contended that as the wall was built in four detached pieces it should be considered as four separate and distinct employments, each under two hundred and fifty dollars. The Court held that to take this view

"would be to declare in effect that a positive prohibition in the charter might be evaded and nullified by a plan so simple that it could scarcely be considered as arising to the dignity of a *trick*; as I can hardly imagine any work required by the corporation to be done that could not thus be di-

vided into parts sufficiently small as to make the expense of doing each part come within the prohibition. The plaintiff's contract, even, would have been unnecessary, and indeed the entire streets of the city might be paved by a Street Commissioner without contract and without subjecting the work to public competition, if such a palpable violation of the law as is shown in the present case should be allowed to prevail."

In *Walton v. The Mayor* (26 A. D., 76), it appeared that the plaintiff sold and delivered butter to the Department of Charities between January and April, 1896, to the value of \$4,286. The butter was delivered in lots, at several different dates, upon separate orders no one of which exceeded \$500. There was no contract except that arising on delivery of the order. The city's counsel admitted that the purchases were properly certified by the Commissioner of Charities to the Finance Department, and a verdict was directed for the plaintiff. Judgment was reversed; Judge Ingraham saying:

"There was no evidence offered by the plaintiff as to any particular necessity for furnishing these supplies at any particular time; *nor did it appear that it was not known when the first order was given that the city would require for the use of the inmates of the public institutions the amount of butter ordered during the months of January, February, March and April, or that any necessity existed for such splitting up in separate amounts the purchase of those supplies of butter for the institutions during the months mentioned* * * * If the plaintiff's contention is right every article of supplies needed by all these institutions could have been ordered by the Commissioner at such prices as he pleased, upon such terms as he pleased, of such quality as he pleased, without competition.

in violation of the Consolidation Act, merely by placing the articles needed in several orders, seeing to it that no one order exceed one thousand dollars."

As illustrating the strictness of the Courts in dealing with this section, reference may be had to the case of the *North River Electric Co. v. The City of New York* (48 App. Div., 14). In that case it appeared that the City of New York would have been left in darkness if the Commissioner had not made a verbal contract with the company to furnish lighting. The lighting was furnished and payment therefor refused on the basis of Section 419, and in a suit for recovery the plaintiff was successful, but even in that case there was a strong dissenting opinion. This case would seem to establish that an emergency is not a trivial thing easily created. See also *Kearne v. City of New York* (88 App. Div., 542).

Liability for the Acts of His Subordinates.

Mr. Ahearn's main defense to all these charges is that he was elected and re-elected by the people of the Borough; that he went to his office every day; that he took no vacation, and that he relied on his subordinates, and that if anything went wrong it was their fault and not his.

We have already at considerable length pointed out the quality of the men that he appointed. Perhaps with the single exception of Mr. Loomis every one of them was unfit; even Mr. Loomis showed on the stand that he was out of touch with the affairs of his bureau and was in turn relying on Mr. Klein. Mr. Ahearn was untrammelled in the selection of his bureau heads and their subordinates. No one else appointed anybody or made a transfer of anybody. He alone even made the selections from the civil service list. It does not appear

that he ever removed any one until May, 1907, following upon the heels of this investigation. He appointed as the Commissioner of Public Works a man to whom he said: "We were district leaders together" (p. 1046), and then proceeded to divest him of every semblance of real authority.

The Court of Appeals of this State has held, in *People ex rel. Campbell vs. Campbell* (82 N. Y., 247, at p. 253), that where a public officer is

"sole master within the range of his appropriate duties and selects and appoints his assistants, he may justly be held responsible for their inefficiency or incapacity, because he appointed them and is responsible for their skill and fidelity."

In *Richmond v. Long* [17 Gratt. (Va.), 375] the Court held that a public officer was responsible for failure to exercise proper and reasonable care in the choice of his subordinates, or for not properly superintending them in the discharge of their allotted duties.

In 1895, James R. Sheffield and the other members composing the Board of Fire Commissioners discharged one Seery from the position of inspector of combustibles in the Fire Department of the City of New York. Certiorari issued and the Appellate Division dismissed the writ and affirmed the action of the Board. After pointing out that Mr. Seery was duly informed of the cause of his removal and afforded a proper opportunity for explanation, Judge Barrett, writing for the Court, goes on to say:

"The question therefore is whether the cause assigned was substantial. * * * He was given the control and direction of all the clerks and other employees assigned to his Bureau. * * * His duties were then of an exceedingly important character. The charge against him (Mr. Seery) was that he issued permits for the sale of fireworks in

violation of the rules of the Board. * * * It is unquestioned that these rules were repeatedly violated and the relator defends himself mainly *upon the plea* that he was *not responsible* for such violations, *for the reason that he invariably acted upon reports of surveyors* who were appointed and removed by the Commissioners themselves and not by him. * * * Mr. Seery was held responsible for his own negligence, not that of the surveyors. His *negligence consisted in accepting from those surveyors reports of the most meagre and insufficient character.* * * * He repeatedly allowed permits to be issued upon reports which contained no *special information* upon this head. * * * He was directly responsible for the conduct of his Bureau and yet he acted as though his function in the matters in question was purely formal. *He seems to think that his responsibility was confined to the acceptance, without question, of the surveyors' conclusions.* The *least diligence* must have obviated the difficulty."

This case was affirmed by the Court of Appeals (in 153 N. Y., 685) *on the opinion of Judge Barrett.*

The opinion reads almost as if the Court were dealing with the case of John F. Ahearn instead of Peter Seery. In reading it we are reminded particularly of Mr. Ahearn's reliance in signing vouchers on the certificates of those below him, and of his accepting the fire-burn inspection reports in 1906.

In 1894, the *Governor of the State of Michigan* removed from office the Secretary of State, the State Treasurer and the Commissioner of the State Land Office, on the ground that they were guilty of gross neglect of duty in certifying as correct a tabulated statement *prepared by their clerks*, to whom the returns of election were turned over, purporting to show the number of votes cast for and

against a constitutional amendment without comparing or examining the returns from any county or comparing them with said tabulated statement and in *reliance solely* upon the *statements of said clerks* that said tabular statement was correct. The Supreme Court of the State held (99 Mich., 358), first, that a public office cannot be called "Property" within the meaning of the constitution; then, that the requirement that a removal cannot be made except upon cause shown and upon notice of specific charges and after a hearing in its nature judicial does not militate against this doctrine; and, finally, the Court takes up the defense that the charges were insufficient because the act was not alleged to have been intentional and because it was not gross neglect to permit an erroneous canvass by clerks. The Court states:

"Section 207 requires an examination by the Board of the several statements of the votes and that they make a statement of the whole number of votes cast for each office, while section 209 makes it their duty to certify such statement to be correct. A mere failure to certify could be called 'neglect'; what shall be said of it when the certificate is made *without knowledge of, or any attempt to ascertain, the facts.* * * * *

While there is an inclination upon the part of the average American to accept good intentions as an excuse for mistakes, it is not for the general public good that responsible public offices shall be confided to, or remain in the custody of, those whose duties and responsibilities rest so lightly upon them as to permit the public interests to be injured or endangered through neglect; and when such neglect, from the gravity of the case, or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross, within the meaning of the law, and *justifies the interference of the executive*, upon whom is placed, by this amendment, the responsibili-

ty of keeping the affairs of State in a proper condition. We cannot think that the term 'gross neglect' means only intentional official wrongdoing. Such acts would hardly be described by the word 'neglect.' It is said that this section *confides great power to the Governor*. This is true; but the governorship is an exalted office,—one which ought to carry with it a presumption of integrity of character and breadth of mind commensurate to its importance. It would be a sad commentary upon free government if it were otherwise. *But the powers of the Governor are carefully restricted, and there is no occasion to pursue the illusive phantoms of possibility*. When abuses arise, they will doubtless be speedily and effectively met."

Acts equivalent to Mr. Ahearn's in not making proper investigation before signing the vouchers have been defined by the courts of Ohio as misfeasance in office. In *Colburn v. Frank Neufarth* (Ohio Probate, 1895-1896, 24), the Court said:

"Where it was the duty of an officer, as a member of a public board, to approve any lawful bills, and in the performance of that duty he should approve a bill which, by the exercise of ordinary care and diligence, he would have discovered when presented, not to be a proper bill, he would be guilty of misfeasance in office."

In that case one of the charges against the defendant was that he had certified to bills in the purchase of materials and in the employment of labor, at extravagant prices and in excess of the fair value and customary rate at which they could have been purchased and employed.

Issuing false certificates is an act authorizing the dismissal of an official (23 A. & E. Enc. of Law, 447). *Commonwealth v. Chambers* (1 J. J. Marsh, Ky., 160). *State v. Leach* (60 Me., 58). See also, *Van Schaick v. Sigel* (9 Daly, 383), where a regis-

trary of deeds in New York was held for neglect in office for an error in certification, although the error was made by his clerk.

So far as the good intentions of Mr. Ahearn go, they alone will not excuse him.

“Misconduct, wilful maladministration or breach of good behavior, in office, do not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or the official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive.” (*Mechem's Public Offices*).

In New York, the Court of Appeals, in *People ex rel. The Board of Police* (69 N. Y., 408) sustained the removal of a superintendent of police, saying:

“A person may have good character, excellent habits, good intentions, sufficient general intelligence, and even in many respects be a good officer, and yet not be adapted to the proper discharge of the important duties of superintendent of police.”

“An officer may undoubtedly be removed for inefficiency or incapacity.”
(Throop on Public Officers, Sec. 374).

THE POWER AND DUTY OF THE EXECUTIVE.

In pointing out the power of the chief executive of the State to make removals from office in the class of cases to which this belongs, the Court of Appeals, in *the Matter of Guden* (171 N. Y., 529), established that, given jurisdiction, the power is purely executive and that the courts will “not examine into the merits, for they do not concern the courts.” This view was reaffirmed by the court in *People v. Hyatt* (172 N. Y., 189). There is, therefore, no rule, in such an investigation as this, as to the weight or preponderance of evidence, nor

is it even "necessary that the order of removal should specify the particular acts for which the removal was made."

See also

Throop on Public Officers, Section
396.

Nevertheless we approach the conclusion of this proceeding in the same attitude that we assumed at the outset and that is, as stated in the preamble to the charges:

"If, after giving him an opportunity of being heard in his defense, the charges appear to be sustained, then we shall respectfully request Your Excellency, in the exercise of the power conferred upon you by the Constitution and Laws of the State of New York, to remove said Ahearn from his office as President of said Borough."

We believe the charges have been sustained and we therefore prefer the request for his removal from office.

The petitioners recognize that Your Excellency, in determining this case, will rightfully be guided by the resolve that, in the exercise of the great power conferred by the constitution and the laws on the Chief Executive of the State, every regard will be observed by you for the rights, not only of the individual, who is presented in these charges, but, as well, of the people of the locality.

We fail to find any validity in the possible contention of the Borough President that, as an elective official, he is entitled to any greater immunity than if he were an appointive official. The laws have conferred upon the people of the borough no other means of choice in filling this high office than by election at the polls; and they must be freed from an unfaithful and incompetent incumbent of the office quite as readily as if the Borough Presi-

dent were appointed by the Mayor of the city with power of removal.

If the only charge that could be brought against John F. Ahearn was that, at the time of his election, he was merely inexperienced, it might be said that the people elected and re-elected that kind of man and must endure him. But it certainly cannot be maintained that they must suffer, and continue to suffer, from his misconduct and neglect in office, if there is power anywhere to remove him. They have the right, in voting, to assume that removal will be the fate of an officer against whom such charges as these can be sustained. The exercise of this power by the Executive is, in our judgment, clearly analogous to the power of recall, directly exercised in other jurisdictions by the electorate itself.

John F. Ahearn, in accepting this office, assumed a great trust; the people of the borough are entitled to its faithful discharge. They have not had it. Charges have been made against him of serious misconduct and neglect and violation of law. Even he must admit that he has had the "fullest opportunity of being heard in his defense." He has not met these charges. The decision is confidently remitted to your hands.

Dated New York, N. Y., November 12, 1907.

NELSON S. SPENCER,
CHARLES H. STRONG,
Counsel for Petitioners.

